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TEXAS'S UNCONSTITUTIONAL ABORTION BAN AND THE ROLE OF THE SHADOW DOCKET

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TEXAS'S UNCONSTITUTIONAL ABORTION BAN AND THE ROLE OF THE SHADOW DOCKET

WEDNESDAY, SEPTEMBER 29, 2021

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10 a.m., in Room 216, Hart Senate Office Building, Hon. Richard J. Durbin, Chair of the Committee, presiding.

Present: Senators Durbin [presiding], Leahy, Whitehouse, Klobuchar, Coons, Blumenthal, Hirono, Booker, Padilla, Ossoff, Grassley, Cornyn, Lee, Cruz, Sasse, Hawley, Cotton, and Blackburn.

OPENING STATEMENT OF HON. RICHARD J. DURBIN, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Chair DURBIN. This hearing will come to order.

I welcome the witnesses and say to my colleagues that we have a roll call vote scheduled to start at 10:30 with a liberal voting period to follow, so there may be a brief interruption while Members go off to vote and return. I want to apologize to the witnesses for any inconvenience it might cause them.

Today the Committee will examine Texas's S.B. 8, which Justice Sonia Sotomayor described as "a flagrantly unconstitutional law engineered to prohibit women from exercising their constitutional rights and evading judicial scrutiny." S.B. 8 attacks the Supreme Court's long-established precedent in *Roe* v. *Wade*. It effectively bans nearly all abortions in Texas, even in cases of rape and incest. It uses a civil lawsuit, a bounty hunter style enforcement scheme that was designed to insulate the law from judicial review. Chief Justice John Roberts would have blocked the law from taking effect, calling the bounty hunter system, quote, "unprecedented." But at midnight on September 1st, after skating through on the Supreme Court shadow docket, Texas's S.B. 8 became the law in the Nation's second-largest State, stripping away constitutional rights for millions of Texans who live there.

I'd like to show a brief video about this Texas law and what is at stake.

[Video played.]

For nearly half a century, there's been a concerted campaign to undermine the Supreme Court's ruling in *Roe* v. *Wade* that women have a constitutional right to an abortion. Opponents of *Roe* have tried a range of legal tactics over the years to undermine this right, but past attempts by States to pass pre-viability abortion bans

have been stopped by Federal courts, which have blocked the States from enforcing these unconstitutional laws.

The architects of S.B. 8 took a new approach. Instead of having the State enforce an extreme abortion ban, they put the enforcement in the hands of private citizens who can be rewarded with a bounty of not less than $10,000. $10,000 is often publicized as what's at stake here. The statute expressly says not less than $10,000, court costs, and attorneys' fees. People who aid or abet, under the statute, an individual in obtaining an abortion in Texas, can now be sued by anybody and everybody under this bounty hunter system. A disbarred attorney in Illinois has been one of the early plaintiffs who brought a lawsuit. One San Antonio doctor has been sued multiple times for providing an abortion to a woman who was in her first trimester.

This type of private vigilante enforcement scheme is unprecedented. Texas lawmakers paired it with a clearly unconstitutional abortion ban, in the hopes that it would shield the law from judicial review on the basis of jurisdictional questions about who could be sued to block the law. A group of healthcare providers did sue State officials in Texas to try to block the law from taking effect, and a Federal district court scheduled a preliminary injunction hearing for August 30th. On August 27th, the Fifth Circuit Court of Appeals stepped in and, without explanation, stopped all district court proceedings. The providers had no choice but to seek emergency relief from the Supreme Court with the clock ticking. This brings us to the role of the Supreme Court shadow docket.

The shadow docket is a set of decisions and orders that the Supreme Court issues outside of its merits docket. These decisions are often rendered on short timetables with full briefing, public deliberation, and detailed—without full briefing, public deliberation, detailed explanation, or even signed opinions. In recent years, the Supreme Court has started to use the shadow docket for more political and controversial decisions, with results that appear on their face to be ideologically driven. A premise of the shadow docket is that emergency injunctions should be granted only when the party seeking relief is likely to prevail and irreparable harm is likely to result if the temporary relief is not granted.

Recently, Justice Breyer in the Supreme Court, published a book in which he argued that it's wrong to characterize this Court as political. Justice Amy Coney Barrett appeared at the McConnell Center at the University of Louisville to make the same argument and to, quote, "convince us that this Court is not comprised of a bunch of partisan hacks." Listen to the numbers on the shadow docket and draw your own conclusion.

Between 2001 and 2017, under the presidencies of President George W. Bush and Barack Obama, there were eight shadow docket opinions in that 16-year period of time. Eight. When President Trump's Justice Department requested emergency relief on the shadow docket—36 requests by the Trump Justice Department—the Supreme Court granted it in 28 instances: 28 out of 36. In the case of S.B. 8, you had a law that is clearly unconstitutional under Supreme Court precedent. There was no question that if the law were allowed to stand, irreparable harm would be done to countless Texans who would be denied reproductive healthcare.

Granting an emergency injunction to stay the law while lower court proceedings proceeded would've been an appropriate use of the shadow docket. Yet, on August 30th, the Court did nothing as the clock struck midnight, and Texas's law went into effect. Only later, the next night, did the Court issue a one-paragraph opinion saying they had declined to stay the law because of its complex and novel procedural questions.

In her dissent, Justice Sotomayor made clear what happened. She said, quote, "The Supreme Court has rewarded the State's effort to delay Federal review of a plainly unconstitutional statute enacted in disregard of the Court's precedents through procedural entanglements of the State's own creation." In other words, the S.B. 8 scheme worked.

This may sound like some abstract legal debate. It's not. The Court's handling of S.B. 8 had a dramatic real-world impact. There are millions of people who, last month, could not exercise their fundamental reproductive rights in Texas. Could before, and now they can't. We now have two dangerous new precedents to contend with. First, with S.B. 8, Texas has created a model to undermine constitutional rights by using bounty hunter enforcement schemes. We are already seeing lawmakers in other States racing to copy that model. That should trouble anyone who cares about constitutional rights and orderly enforcement.

Second, the Supreme Court has now shown that it's willing to allow even facially unconstitutional laws to take effect when the law is aligned with certain ideological preferences. Constitutional rights for millions of Americans should not be stripped away in the dark of night, even at the Supreme Court. That is exactly what happened when the architects of S.B. 8 did their bidding—pardon me, when the Supreme Court did their bidding at midnight on September 1st and the Supreme Court allowed it.

It's already too late for many Texans, whose rights have been suspended and who have been forced to leave the State to seek reproductive healthcare the Constitution has already guaranteed them, but it is not too late for the rest of the country and the Court to change course.

I want to thank our distinguished panel of witnesses for joining us today, and I now turn to Ranking Member Grassley for opening remarks.

OPENING STATEMENT OF HON. CHARLES E. GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Senator GRASSLEY. Thank you, Chairman. We're having a hearing today because the Supreme Court did something very ordinary. I'd like to say that again so it sinks in. We're having a hearing because the Supreme Court did not do something extraordinary. It declined to intervene on exceedingly expedited basis while reserving judgment on complex legal issues.

Much of the talk about the case has referred to the Court's so-called shadow docket. For a long time, the Court and its practitioners have called this the emergency docket because it is designed so the Court can provide relief in emergencies. A good amount of these orders have historically dealt with last-minute death penalty appeals, but we didn't hear complaints from the lib-

erals in the Senate about the docket for those cases. Rather than rely on a catchy name invented by a law professor, let's look at what the Supreme Court actually said in its decision September 1.

In that case, the plaintiffs waited several months to sue after the law was passed, so the Court did not have much time to work through the legal issues in the case. Having not succeeded in the lower courts, the plaintiffs asked the Supreme Court to grant them emergency relief. A majority of the justices on the Supreme Court said that the abortion providers had raised serious constitutional questions. They did not prejudge the issue, but they acknowledged that the plaintiffs had a serious case. The Court also said that the case raised novel procedural issues. It noted that under current precedent, it was not clear that the plaintiffs could sue the defendants. The Texas Heartbeat Act specifically prohibits several of the defendants from enforcing the law. Instead, private parties can do so in court.

The majority noted that this system raised novel legal issues, and everyone seems to agree on that point. The Supreme Court said that it wanted the lower courts to address these novel issues before the Supreme Court addressed them. There are also at least 14 suits in State court and the Federal Government suit against Texas. The courts are addressing the legal issues on an expedited timetable. Those cases will work through the lower courts.

I'm looking forward to hearing more from our witnesses today about how the Supreme Court's decision fits with this normal practice. Before I listen to that, I also want to talk about why we're having this hearing right now. The Texas Heartbeat Act was signed into law, May. There are hearings in State and Federal courts this week and next about whether courts should grant relief. The abortion providers just asked the Supreme Court to provide the case or to take the case on the merits, without wanting—or waiting for a court of appeals.

Why are we having this hearing at the last week of September? It's because the Supreme Court starts hearing cases next week. This term, the Supreme Court has agreed to hear a case about a Mississippi law on abortion. The law protects the lives of unborn children by prohibiting abortions after 15 weeks except for medical emergencies. Mississippi said it enacted the law to protect the health of mothers, the dignity of the unborn, and the integrity of the medical profession. Of the 59 countries that permit elective abortions, more than 75 percent do not allow elective abortions past 12 weeks of gestation, but abortion activists are worried that the Supreme Court might agree that States can regulate abortion at 15 weeks. Liberal dark money groups are also worried about that result, and they believe that a public campaign can influence the Supreme Court's decisions. These groups have been publicly celebrating polls that show that the public's trust in the Supreme Court has dropped.

Why do polls show that public confidence may be decreasing? It's because of dark money groups like Demand Justice are running multi-million-dollar partisan smear campaigns against our Supreme Court. It also is because Senators on the other side have threatened the Supreme Court. They've called out justices—they've done it by name—and said that those justices will pay the price if

they ruled the wrong way. If the justices reached the wrong result, they were told, quote, "You won't know what hit you if you go forward with these awful decisions," end quote. Other dark money groups, partisans, and activists undermine the Court by claiming that Justice Barrett's confirmation was an illegitimate process, because one of the Democrat witness—including one of the Democrat witnesses we have today.

Democrats and partisan dark money groups love to predict the future. They certainly don't lack confidence in their predictions, but those predictions are not very good. Democrats claimed that voting for Justice Barrett was voting, quote, "to strike down the Affordable Care Act and eliminate protections for millions of Americans with pre-existing conditions," end of quote. Judge Barrett, according to them, was a judicial torpedo aimed at those protections from Obamacare. That scared a lot of Americans, but it sure wasn't true, because Barrett joined the Court's 7-to–2 majority that upheld that law.

Some Democrats have said the courts need to, quote, unquote, "heal itself" before the public demands that the Court be restructured in order to reduce the influence of politics. That's a fancy way of saying that if the rulings don't change, they'll try to pack the Court. This campaign against the Court and against individual justices has hurt the public. The dishonest rhetoric doesn't help the American people understand the issues. I'll continue fighting against the partisan efforts by dark money groups to attack our judicial—judiciary.

There is one final point I want to raise today before we hear from the witnesses. The House of Representatives just passed a bill that could allow abortion on demand. It would preempt numerous prolife State laws, and it would throw out the protections of the Religious Freedom Restoration Act. If Democrats truly believe that the Court will overrule *Roe*, they should have a hearing on that bill in the—this Committee. The American people would see how radical that bill is. Contrary to the outlandish claims by abortion activists, the Supreme Court did not overrule *Roe*. I think our witnesses today will explain this and offer some much-needed information about the role of the emergency docket of the Supreme Court. Thank you.

Chair DURBIN. Thank you, Senator Grassley. I don't know that there was anything sinister or conspiratorial about scheduling this hearing. I don't know how anyone could ignore the fact that this has been the subject of a national debate about *Roe* and the issue of abortion. This Committee is charged with the responsibility of oversight of agencies, and the consideration of any measures relative to the *Roe* v. *Wade*, I think, is our responsibility, and there was nothing sinister in selecting this date for the hearing.

Today, we welcome five witnesses. I want to thank them for joining us. Let me briefly introduce each. Our first witness is State Representative Donna Howard of Texas. She's been in the Texas House of Representatives for 15 years, representing Travis County, chairs the Texas Women's Healthcare Caucus, serves on the State Affairs and House Appropriations Committee. Representative Howard holds a bachelor's degree in nursing, a master's degree in health education from the University of Texas at Austin, and pre-

viously served on the boards of the Texas Nurses Association and the Texas Public Health Association.

Edmund LaCour currently serves as solicitor general of the State of Alabama. He has served in the Alabama attorney general's office since 2018. Prior to that, worked for the Washington firm of Kirkland, Ellis & Bancroft, and the Houston, Texas office of Baker Botts. He received his BA from Birmingham Southern College, his JD from Yale Law School, and clerked for Judge William Pryor in the Eleventh Circuit.

Fatima Goss Graves is the president and CEO of National Women's Law Center. She's worked at NWLC for over 10 years on a broad set of issues central to women's lives, including income security, health and reproductive rights, education access, and workplace fairness. Received her BA from UCLA, her JD from Yale, clerked for Judge Diane Wood on the Seventh Circuit.

Professor Jennifer Mascott is an assistant professor of law and co-executive director of the C. Boyden Gray Center for the Study of Administrative State at George Mason University's Antonin Scalia Law School. Her scholarship focuses on administrative law, Federal courts, and constitutional law. Previously worked as Associate Deputy Attorney General and as Deputy Assistant Attorney General in the Office of Legal Counsel, received her JD from George Washington U. Law School, clerked for Justice Clarence Thomas and for then-D.C. Circuit Judge Brett Kavanaugh.

Professor Stephen Vladeck holds the Charles Alan Wright Chair in Federal Courts at the University of Texas Law School. He joined the Texas faculty in 2016, after previously teaching at the University of Miami Law School and American University Washington College of Law. He's argued multiple cases before the Supreme Court and is a nationally recognized expert on Federal courts and constitutional law. Received his BA from Amherst, his JD from Yale Law, clerked for Ninth Circuit Judge Marsha Berzon, and Eleventh Circuit Judge Rosemary Barkett.

The mechanics of today's hearing is the usual. After we swear in each witnesses, we will have 5 minutes for opening statements. Then we will turn to questions from Senators, and each Senator will have 5 minutes. Senator Klobuchar has asked for special permission to be recognized early so she can attend the funeral service for our late Susan Bayh, wife of a former colleague. We'll make that accommodation, certainly, for her.

Let me ask all the witnesses to please rise for the oath.

[Witnesses are sworn in.]

Let the record reflect that the witnesses answered in the affirmative. Representative Howard, you're first.

STATEMENT OF DONNA HOWARD, TEXAS STATE REPRESENTATIVE, DISTRICT 48, CHAIRWOMAN, TEXAS WOMEN'S HEALTH CAUCUS, AUSTIN, TEXAS

Representative HOWARD. Thank you. Donna Howard, State Representative from Austin, Texas and chair of the Texas Women's Health Caucus. I'm here today to provide an overview and discussion of Senate Bill 8 and its impacts on Texans.

It's important to understand that S.B. 8 was preceded by policies and legislation that reduced access to care by creating medically

unnecessary obstructions to healthcare. A quick summary of how we got here: Following the 2010 elections, when the Tea Party was able to secure a supermajority in the Texas House, there was an immediate effort to prevent healthcare providers who performed abortions from participating in the State's women's health program, by cutting the budget for women's health by two-thirds, and by creating a tiered system that was intended to capture such providers as Planned Parenthood. Unfortunately, there was significant collateral damage in that the policy also captured faith-based clinics, academic-based clinics, community clinics, and more and resulted in the closure across the State of at least 80 clinics. The safety net had been shattered, and it has taken years to try to build back a system that would serve at least as many Texans as were served prior to the 2011 cuts.

During that same session, a bill was passed requiring a transvaginal sonogram being performed between 24 and 72 hours before an abortion could be performed. Subsequent restrictions were passed in following sessions that created more obstacles, including efforts to require medically unnecessary standards for providers and facilities, prohibiting insurance coverage of abortion, and weakening the use of FDA-approved guidelines for administration of safe abortion medications.

S.B. 8 was the culmination of a decade of erosion of access to abortion healthcare, with the intent of creating a de facto ban without actually calling it a ban. Here's a brief timeline of how this bill denies access to 85 to 90 percent of those who are seeking to terminate an unwanted pregnancy. First, it's important to understand that the bill is based on a false premise that is meant to tug at one's heartstrings. No abortion after a fetal heartbeat or cardiac activity can be detected. Developmentally, the embryo has no beating heart at six weeks' gestation, but cardiac cells that emit electrical activity can be amplified by a transvaginal sonogram and translated into a whoosh, whoosh sound as early as 6 weeks' gestation, which is actually four weeks of pregnancy, which is only two weeks past a missed period if you happen to have regular periods and keep up with them, which means before many even know they are pregnant. Someone could become pregnant unknowingly and unintentionally, as contraceptives are not 100 percent effective. There are, of course, also unwanted pregnancies as the result of assaults, domestic violence, and incest.

Regardless, when someone suspects they might be pregnant, they are already past four weeks' gestation, which is measured from the first day of the last menstrual period, likely at least five weeks' gestation, at the earliest. They then must get an appointment to confirm their pregnancy, make the very personal and intimate decision about whether abortion is the option they want to pursue, make an appointment to receive the initial required sonogram, and then come back to the same doctor 24 to 72 hours later to receive another transvaginal sonogram to determine whether there is cardiac activity, before they can actually receive their abortion. The clock runs out for most, forcing them to carry a pregnancy that they did not want.

Enforcing the implementation of S.B. 8 has been given to private actors without standing who can sue for a minimum of $10,000,

opening up the possibility of the most frivolous of frivolous lawsuits, and has had a chilling effect on doctors being able to deliver the necessary medical care that they've taken an oath to provide. I've heard reports of doctors leaving our State, when we already have a shortage. We're not just talking about abortion providers. This has had a chilling effect on emergency room physicians, rural healthcare practitioners, and any medical professional who might be confronted with a post-6-week patient who needs care that they determine medically justifies pregnancy termination but have to balance that against losing their practice through costly litigation.

Most importantly, Texas women now have very limited options. Those who can afford to may go out of State, that is, if the other States have capacity, as they have reported exponential increases in Texans seeking their services. This is not an option for at least half of those seeking abortion, who do not have the resources to travel for days to meet the out-of-State requirements or to arrange childcare or take off work and be docked. Those most vulnerable and who could potentially incur significant economic hardships with being forced to carry an unwanted pregnancy are most impacted by S.B. 8.

As someone who came of age pre-*Roe* v. *Wade*, it was—when it was not only illegal to get an abortion but also to get contraceptives, I can tell you I am very concerned about going back and erasing all the progress we've made over the past century. Women's ability to pursue education and employment opportunities over that time has been greatly enhanced by the ability to have autonomy over their own bodies, something that men enjoy despite the fact that they share 50 percent of the responsibility for the pregnancy but oftentimes zero percent of the consequences.

This is about personal freedom and respecting that women know what is best for them, their family, and their destinies. This is about healthcare and trust in the doctor-patient relationship. This is about giving women control over their very lives without Government interference. Thank you.

[The prepared statement of Representative Howard appears as a submission for the record.]

Chair DURBIN. Thank you, Representative Howard. Now, Mr. LaCour.

STATEMENT OF EDMUND GERARD LACOUR, JR., SOLICITOR GENERAL, ATTORNEY GENERAL'S OFFICE, ALABAMA, MONTGOMERY, ALABAMA

Mr. LACOUR. Mr. Chairman, Ranking Member Grassley, and distinguished Members of this Committee, thank you for inviting me to testify about the U.S. Supreme Court's emergency proceedings. I'm honored to be here.

My name is Edmund LaCour, and I'm the solicitor general of Alabama. In that role, I litigate before Federal and State courts on behalf of my home State. Many of our cases involve time-sensitive matters and requests for emergency relief made either by the State or by our opponents, and many of these cases have gone before the Supreme Court. I thus have firsthand experience with the high Court's non-merits docket and, in particular, its emergency proceedings.

In my time before you this morning, I would like to make three points. First, the term "shadow docket," though evocative, is ultimately inapt. As the Committee is aware, this phrase was coined by law professor Will Baude, who used the term to refer to the thousands of non-merits decisions the Supreme Court makes each year. But current conversation about the so-called shadow docket has largely narrowed in scope to refer almost exclusively to the Court's emergency proceedings. These proceedings hardly warrant such a nefarious name. Requests for preliminary injunctive relief are a critical piece of any court's business, including Federal district courts, courts of appeals, and the U.S. Supreme Court. And far from lurking in the shadows, the Supreme Court's entire docket is freely searchable online. While these emergency proceedings are often fast paced, the reality is that litigation sometimes presents emergencies that require emergency action from whatever court is called upon to judge the matter.

Second, the Court's decisions in emergency proceedings, though often offering less guidance for non-parties than most merits opinions, typically serve the parties well. Two of Alabama's recent cases illustrate the point. The first case, *People First of Alabama* v. *Merrill*, required the State to seek emergency relief from the Supreme Court. Though the Supreme Court has long warned lower courts against changing voting laws on the eve of an election, because such last-minute changes create risks of voter confusion, a Federal district court nevertheless changed important Alabama voting laws weeks after absentee voting had already begun. The Supreme Court rightly stayed the lower court's injunction and allowed Alabama to again enforce its laws.

The other case, *Dunn* v. *Smith*, did not go Alabama's way, but also illustrates the importance of the emergency docket. Willie Smith is a death row inmate who was scheduled for execution earlier this year. He asserted that the State's execution safety protocol violated his religious liberty rights because the protocol did not allow for his pastor to accompany him into the execution chamber.

Alabama and the district court disagreed with *Smith*, but 24 hours before his scheduled execution, a divided Eleventh Circuit panel granted Smith an injunction. The State thus filed an emergency application with the Supreme Court, seeking a stay. Both sides were able to brief our arguments and submit to the Court the crucial information it needed to issue a thoughtful ruling, given the emergency posture of the case. While I think Alabama presented a strong case, a majority of the justices ultimately rejected it.

Though the order was not accompanied by a lengthy majority opinion, the stay made clear that the State would either need to alter its execution protocol or delay Smith's execution while pressing on through the normal appellate process, and a thoughtful concurrence from Justice Kagan improved the State's understanding of the burdens it would likely need to satisfy going forward. Many of the Court's emergency docket decisions fit this mold.

Finally, the recent emergency docket decisions that have garnered attention from the Committee are less remarkable than some have suggested. Most notably, the Court's recent decision in the Texas S.B. 8 litigation, to deny the plaintiff's request for an injunction, was an entirely ordinary ruling. After all, one thing most ev-

eryone agrees on about S.B. 8 is that it raises unprecedented and difficult jurisdictional questions. It thus would have been extraordinary had the Court granted an injunction against the defendants when it was highly doubtful the Court even had authority to act.

I'd like to thank you again for the opportunity to offer testimony today. I hope that what I offer is useful, and I'm happy to answer any questions Members of the Committee may have for me. Thank you.

[The prepared statement of Mr. LaCour appears as a submission for the record.]

Chair DURBIN. Thank you, Mr. LaCour. Ms. Graves.

STATEMENT OF FATIMA GOSS GRAVES, PRESIDENT AND CEO, NATIONAL WOMEN'S LAW CENTER, WASHINGTON, DC

Ms. GRAVES. Chairman Durbin, Ranking Member Grassley, and Members of the Committee, thank you for the invitation to testify today. My name is Fatima Goss Graves, and I'm president and CEO at the National Women's Law Center. I'm here today because both our right and access to abortion are at a perilous crossroads. With that, our liberty and our equality are in crisis, as well, because with every attack on our fundamental human right to reproductive healthcare, including abortion care, each of those values erode. A right without access is a right denied. Abortion opponents know this and have mounted their offense since *Roe* was decided and have dramatically increased those efforts over the last three years.

In 2021, they introduced more than 560 restrictions and passed more than 90. Those laws forced clinics to close, they caused delays in receiving care, and effectively denied access to constitutionally protected healthcare. These laws are also dangerous, threatening patients' health and well-being and financial security. This is all by design. As the Court has tipped more and more into an anti-abortion majority that it is today, the attacks escalated, and the State laws became more brazen and the methods more insidious. Make no mistake, abortion opponents want the Court to overturn *Roe*, and that goal may be in reach.

On December 1st, the Supreme Court will hear oral argument in *Dobbs* v. *Jackson Women's Health Organization*, a case about the Mississippi ban on abortion after 15 weeks in pregnancy, and it presents a direct challenge to both *Roe* and *Casey*. Even as that case has been pending, abortion opponents sought to accelerate the elimination of abortion access. Texas S.B. 8 was written to ensure that its 6-week ban on abortion would evade judicial review and quickly go into effect. In a shadow docket ruling in the middle of the night, without full briefing, without oral argument, five Supreme Court Justices allowed Texas to effectively shut down legal abortion in the State.

The dramatic shift in the law, limiting our very access to the Constitution, was ushered in under the guise of procedure, but this is not a ruling with a mere technical outcome. S.B. 8 is having its intended effect. As a result of the law, abortion providers in the State have stopped providing nearly all abortion after six weeks.

To be clear, laws like S.B. 8—they don't eliminate the need for abortion. They simply remind us of the indignity of not being afforded our full constitutional protections. Bearing the brunt of this law will be Black and Indigenous and Latinx individuals who are disproportionately likely to live in poverty in Texas. Bearing the brunt will be workers who cannot afford to get time off of work or the additional expenses now required to access abortion if you live in Texas. It will be mothers who need to line up extra childcare and add more expenses to an already broken system, and it will be the person who lives in rural areas like the Rio Grande Valley, particularly someone who is an immigrant without documentation, who just won't be able to make the arduous trip out of State.

What is happening in Texas is the result of the horrifying outcome of a decades-long campaign by anti-abortion State lawmakers. After nearly 50 years, the Supreme Court has effectively overturned *Roe* for 1 in 10 women of reproductive age in this county. If you can upend our constitutionally protected right to abortion in a one-paragraph opinion, where does it end? If that seems like a reach, I'd just like to remind everyone that the moment we are in, a few years ago seemed like a reach, and yet here we are.

We need Congress to protect the right to abortion and pass laws like the Women's Health Protection Act that protect and expand abortion access. I'm asking all of you here today, and really everyone in this country as a whole, to see the reality of this moment for what it is and the tremendous loss of liberty, equality, and justice that we face if we do not stop it. Thank you.

[The prepared statement of Ms. Graves appears as a submission for the record.]

Chair DURBIN. Thank you very much, Ms. Graves. Now Professor Mascott, please.

STATEMENT OF JENNIFER MASCOTT, ASSISTANT PROFESSOR, ANTONIN SCALIA LAW SCHOOL, GEORGE MASON UNIVERSITY, ARLINGTON, VIRGINIA

Professor MASCOTT. Good morning, Chairman Durbin, Ranking Member Grassley, Members of the Committee. Thank you for the invitation to testify today on Supreme Court jurisdiction and the Court's orders dockets. I'm a professor at Scalia Law School, where I teach and write in the areas of constitutional law and the separation of powers. My testimony will address the recent emergency motion on the Texas Heartbeat Act and then touch on general trends in Supreme Court resolution of non-merits matters.

On September 1st, the Supreme Court declined to issue an order enjoining application of the Texas Heartbeat Act, and that decision was consistent with longstanding Federal jurisdictional doctrines related to questions of standing, State sovereign immunity, and the constitutional limitation of the Federal judicial role to resolving cases and controversies. In light of these complex issues and the lack of a present concrete dispute involving the defendants in the litigation, it would have been extraordinary for the Court to grant an order on the merits of the challenged State law. The Court's decision not to intervene maintained the pre-litigation status quo.

This hearing will examine, in part, the recent pace of the Supreme Court's issuance of orders without merits briefing, but such

an order was not issued in the Texas case. Unlike in past cases where the Federal Government has sought relief from immediate injunctions against its policies, there are serious jurisdictional questions here whether a court could provide any effective relief in *Whole Women's Health* v. *Jackson*.

The petitioners sued several State defendants who lack any role in enforcing the Texas statute: a private party, a county judicial clerk, and one State court judge. None of those defendants had taken any action to enforce the Texas law's private remedy, and petitioners have not established any basis on which a Federal court would have the power to issue an order at this time enjoining action by any of them. The litigants and commentators here have not identified a specific party yet against which the Court could have issued an order in this case.

Over the last part of the 20th century, as Federal courts routinely stepped in to make it their business to review legislative policy determinations, the American public grew more accustomed to thinking of Federal courts as general arbiters of fair policy, but the founders and jurists throughout most of the Nation's history understood that courts have such a powerful role when they issue final resolutions in cases that judicial review should be exercised with great care.

Article III of the Constitution limits the Federal judicial role to resolution of cases and controversies against particular parties. The drafters and ratifiers of the Constitution rejected proposals for a general council of revision to review abstract legal questions, and the Court's repeatedly reaffirmed, over hundreds of years, its lack of power to issue advisory opinions. It should not, and really lawfully cannot, generally review legislation or provide legal guidance outside the context of concrete disputes.

In the U.S. representative republic structure, Federal and State legislatures bear general responsibility for policymaking, to help ensure that laws regulating citizens represent the interests of the electorate. The Federal judiciary has the more modest role of stepping in when laws are applied in a way that creates a dispute impacting a particular party who then initiates a case challenging the law, and at the core of our constitutional structure are principles like the three-branch separation of powers and federalism, which preserves a vibrant role for elected State bodies.

One of the constitutional principles preserving that structure is State sovereign immunity. That immunity encompasses both suits against States and various State officials, and in the well-established precedent of *Ex parte Young*, the Supreme Court dismissed a suit for lack of jurisdiction where none of the State officers held any special relation to the particular statute alleged to be unconstitutional. The Court noted none of the officers had been expressly directed to enforce the law, and so litigation couldn't serve as a vehicle to bring a general challenge to the law's constitutionality.

In light of these principles, the Supreme Court noted complex and novel antecedent procedural questions in *Whole Women's Health*. The Court acknowledged applicants had raised serious constitutional questions but also that review of the merits of the law wouldn't be appropriate in the current posture. This determination was consistent with the Court's lack of power to generally review

or enjoin laws themselves, in contrast to the judicial power to enjoin individuals tasked with enforcing laws.

Moving for a moment to the Court's orders docket more generally, maintenance of such a docket is typical for a judicial body. It's a longstanding practice of the Court. Recently, as folks here have said, the Court's orders docket's received more attention because of a well marketed, smart law review article coining the edgy phrase "shadow docket." There really isn't anything shadowy about it, in the sense that briefs and decisions on the docket are publicly posted and, like many courts, the Supreme Court uses that docket to resolve a number of types of matters, like denials of cert petitions, requests for stays of executions, and increasingly, review of district court-ordered nationwide defendant-oriented injunctions. Use of such a docket generally is fairly routine, and if there's concern about it, the best solution would be for more policy-based decisions across the board to be left up to State and Federal legislatures.

Here, with the Texas law, the Supreme Court likely lacked jurisdiction at this time, and its decision to decline to reach out and take the case anyway preserved the pre-litigation status quo. Thank you.

[The prepared statement of Professor Mascott appears as a submission for the record.]

Chair DURBIN. Thank you. Professor Vladeck.

STATEMENT OF PROFESSOR STEPHEN I. VLADECK, CHARLES ALAN WRIGHT CHAIR IN FEDERAL COURTS, UNIVERSITY OF TEXAS SCHOOL OF LAW, AUSTIN, TEXAS

Professor VLADECK. Mr. Chairman, Senator Grassley, Members of the Committee, thank you for the invitation to testify today. I want to use my remarks this morning to explain why S.B. 8 and the Supreme Court shadow docket have far more in common than simply their intersection in the Court's 5-to-4 ruling on September 1st. In different but powerfully related ways, they both have ominous implications for the rule of law.

Taking S.B. 8 first, what cannot be stressed enough is the extent to which the law is carefully and deliberately designed to insulate from judicial review Texas's ban on virtually all abortions after the sixth week of pregnancy. Through an array of cynical procedural contrivances, a State legislature succeeded in depriving millions of people of their Federal constitutional rights, and with every day that passes, a growing number of those same individuals are being permanently deprived of their rights.

It should go without saying, Mr. Chairman that our constitutional rights can't and shouldn't be left to the whims of 50 different State legislatures, even if we might disagree as to what those rights are. As this Committee knows well, that's one of the central reasons why the Constitution creates an independent Federal judiciary. And yet too many people who ought to know better have no problem with what Texas has done or throw their hands up simply because they think that *Roe* and *Casey* were wrongly decided. The mindset appears to be that the ends justify the means, even if the means would leave 50 State legislatures, rather than one Supreme Court, in charge of deciding what our constitutional rights mean.

In broader strokes, one can say much the same thing about the Supreme Court's growing reliance on the aptly named shadow docket to hand down cryptic decisions affecting millions of people. As I note at length in my written testimony, far more often than ever before, the Justices are granting emergency relief that either freezes Government policies or allows policies that were frozen by lower courts to go back into effect. What's more, they're doing so through unsigned, mostly unexplained, and often inconsistent rulings. Rulings that they are simultaneously instructing lower courts to treat as precedential. Anyone who suggests that there's nothing new under the sun is missing the fact that the Supreme Court had never previously said these orders were precedential, that it's never previously had as many as we've seen.

To be clear, it's not the volume by itself that's the problem. It's that more and more of these rulings are directly and permanently shaping State and Federal policies and not just narrowly and temporarily adjusting the status quo between two parties to a dispute, such as the death penalty case Mr. LaCour referred to. This practice has become so pervasive that it's no longer possible to explain it away as a momentary aberration or a response to any one external catalyst like nationwide injunctions. For a Court that expressly defines its legitimacy by its ability to offer principled justifications for its decisions, its inability—indeed, its refusal—to do so on the shadow docket has equally troubling implications for the rule of law.

Here, again, as with S.B. 8, defenders of the Court's efforts gravitate toward the bottom line, brushing away these mounting process-oriented objections as trivial or as terminological or as bad-faith criticisms by progressives who are simply unhappy with the results. The not-so-subtle implication is that so long as the Court is getting the merits right, the procedures that the Justices follow or the persuasiveness of their explanations simply don't matter. That's where the Supreme Court's non-intervention in the S.B. 8 case is so revealing. It's not just that the Court declined to stop S.B. 8 from going into effect, and it's not just that the only justification the majority offered was a cryptic paragraph presenting a single procedural question as if it were three distinct procedural obstacles. It's that this was the same five-Justice majority that ran right past even more significant procedural roadblocks to enjoin multiple State COVID mitigation policies on religious liberty grounds in three prior shadow docket rulings over the last nine months, rulings that neither Mr. LaCour nor Professor Mascott have mentioned this morning.

Not only was the Court's barely explained non-intervention in Texas flatly inconsistent with its repeated interventions in California and New York, but in the process, the Court rewarded Texas for its cynicism, where the State's contrived procedural complexities became the Justices' stated justification for not blocking a patently unconstitutional statute. I don't count myself a pessimist, Mr. Chairman, but it's hard to look at these developments and be especially optimistic about the future of our legal institutions.

It's the Supreme Court, not State legislatures, that gets the final word as to what the Constitution protects, and it's the Court's obligation to do so through principled decisions that adequately and

consistently explain themselves. It may be tempting to some to sacrifice these longer-term principles in the name of short-term victories, but it is, in my view, irredeemably myopic. As Justice Jackson closed his famous concurring opinion in the Steel Seizure case, "Such institutions may be destined to pass away, but it is the duty of the Court to be last, not first, to give them up." Thank you, Mr. Chairman. I look forward to your questions.

[The prepared statement of Professor Vladeck appears as a submission for the record.]

Chair DURBIN. Thank you very much, Professor. Senator Klobuchar.

Senator KLOBUCHAR. Thank you very much, Mr. Chairman. I appreciate this. Representative Howard, it's good to see you again. Justice Sotomayor described the Texas law as a flagrantly unconstitutional law engineered to prohibit women from exercising their rights. You're a former registered nurse. You are chair of the Texas House Women's Health Caucus. Can you briefly say a bit more about what you've seen on the ground in Texas since the Texas law took effect four weeks ago?

Representative HOWARD. Yes. Thank you, Senator. We've seen and heard from constituents across the State about their inability to access care, trying to get to a clinic before a 6-week period of time, getting there, having the transvaginal sonogram, and actually hearing the audible sound and being turned away. The providers are saying that they're doing crisis counseling now for these people who are coming with their unwanted pregnancies, unable to terminate them, and desperate about what they're going to be able to do.

Senator KLOBUCHAR. If the law causes health clinics to close, what's the impact on your State?

Representative HOWARD. It's beyond abortions, because most of these clinics also provide preventive healthcare for women. We're talking about a State that already has limited access, not enough providers, have not expanded Medicaid coverage. We have very much difficulty now with women getting the healthcare that they need. This is going to make it even worse.

Senator KLOBUCHAR. Exactly. Ms. Graves, I'm concerned about what Justice Sotomayor described as the Texas law's creation of Texas bounty hunter—citizen bounty hunters who are offered, in her words, "cash prizes for civilly prosecuting their neighbors' medical procedures," which is exactly what this is. That's why I'm working with a number of Senators on this Committee to lead a bill Representative Sheila Jackson Lee is leading in the House, to allow judges to enhance the penalty for people who are convicted of stalking women in an attempt to get their private health information. Can you talk about the threat to women's safety that is created by the incentives in the Texas law to collect healthcare-related information?

Ms. GRAVES. You know, Senator, I share that concern, in part because abortion access already happens in a backdrop where there is a long history of vigilante violence without that bounty, without that incentive. I'm extremely concerned about the policing of women's bodies in this way by their neighbors, by strangers, by anyone in the general populace.

Senator KLOBUCHAR. Very good. Along those same lines, can you say more about how the Texas law is a part of a larger effort to undermine the protections of *Roe* v. *Wade*?

Ms. GRAVES. One of the things that Representative Howard had named is that this isn't the first restriction. We have seen hundreds of restrictions pass over the last decade. In isolation, one of these types of restriction might harm someone, might help shut a clinic down, might make it—might force you to go deeper into your pregnancy or have to travel hundreds of miles. These restrictions are happening on top of each other in places like Texas. For many people, abortion is already out of reach.

Senator KLOBUCHAR. Okay. My last question, Professor Vladeck, the Texas case is just the most recent example of the Supreme Court issuing short, unsigned, 5-to-4 decisions without full briefing or oral argument that directly impact people's lives. We've actually seen this with voting rights, where one day before Wisconsin's primary election, the Court issued a 5-to-4 decision reversing a district court's order which allowed voters an extra six days to cast absentee ballots in the middle of a pandemic. Instead, we saw the voters standing in long lines in garbage bags and homemade masks in a rainstorm. What does it mean for public confidence in the Court, when it issues decisions that are so fundamental to people's rights, including endangering voters' health and undermining women's access to healthcare, in the middle of the night, on a shadow docket?

Professor VLADECK. I mean, I think it can't do much, Senator. I think the less the Court explains itself, the harder it is for the public to have confidence in these decisions, unless, Senator, all we're doing is tallying up the score and all we're doing is figuring out who won and who lost. That's why, you know, in response to the Ranking Member, I guess my response is, you know, the Court has brought this upon itself. That if the Court is worried about public confidence, one of the things it can do is try to restore that confidence by at least endeavoring to explain its decisions in these contexts more fully.

Senator KLOBUCHAR. Thank you very much. Thank you, Mr. Chair.

Chair DURBIN. Senator Grassley.

Senator GRASSLEY. Thank you, Mr. Chairman. I'm going to go with Solicitor LaCour. As you mentioned in your opening statement, emergency provisions are an important part of the business of courts. There is nothing unusual about the Federal court using its equitable power to grant emergency relief to parties that come before it through preliminary injunctions and temporary restraining orders. Lower Federal courts do so regularly. How does the Supreme Court's emergency docket differ from lower courts decisionmaking with respect to injunctions and temporary restraining orders?

Mr. LACOUR. Ranking Member Grassley, you're correct that it—similarly, I mean, with—we've faced TROs from district courts where we have received the order from the court orally, from the bench, with no written order, and these are emergency situations where courts need to act quickly. I think one of the difficulties the Supreme Court might have that a single district court judge might

not have is that the district court is writing for himself or herself alone, whereas the Justices are—have to try to convince at least four of their colleagues, if not more, to join a particular opinion. I think that is potentially one reason why the opinions are a bit shorter than you might get from the merits docket, or sometimes you only get the order itself, but again, that happens, as well, at district courts and at courts of appeals.

Senator GRASSLEY. With—same to you. Without the Supreme Court's emergency docket, how can litigants whose fundamental rights are at stake seek immediate relief?

Mr. LACOUR. They can seek it from lower courts, but there's no principled reason why the lower court necessarily should have the last word, as opposed to the highest court.

Senator GRASSLEY. To you, also, in response to a question for the record, Elizabeth Prelogar, this administration's nominee to be Solicitor General at the Federal level, suggested that, quote, "nationwide injunctions generally exceed district courts' constitutional and equitable authority," end quote. If the district court issues a nationwide injunction that exceeds its authority, is it an appropriate use of the Supreme Court's emergency docket to stay that injunction pending appeal?

Mr. LACOUR. I believe it would be, Ranking Member Grassley.

Senator GRASSLEY. Based on your experience litigating cases before the Supreme Court, do the Court's emergency proceedings provide parties sufficient opportunity for briefing and presenting their arguments?

Mr. LACOUR. I believe they do. We could always use more time, but we've been able, oftentimes, in—for example, in the *Dunn* v. *Smith* case I referenced earlier, we had less than 24 hours, but we worked through the night, and we presented a strong case to the Court, I thought. Mr. Smith's counsel was able to represent him well, and he ultimately prevailed in that particular emergency proceeding.

Senator GRASSLEY. Ms. Mascott, why would it be unusual or problematic for Federal courts to resolve new and complicated procedural questions in the context of emergency application for relief?

Professor MASCOTT. I think here, in the particular motion involving the Texas case, the question was really whether the Court had jurisdiction to be able to issue an order against any of the parties, and I think it—from—it was clear from the information that it gave us that it had serious questions that it did, and so it declined, really, to step in and change the status quo of what had happened in the lower courts in that case, but recognizing that there were potentially serious constitutional questions. I think in the discussion today, it's really important generally to keep in mind that the Supreme Court does not reach out and control its docket. It's resolving matters that are brought to it. It's sometimes up through regular petitions for cert, and then sometimes through requests for emergency relief.

Again, particularly with the Texas case, that bill was enacted in May, and litigants waited months to bring the request. If the Court was rushed in its consideration here, again, it was responding to the timing of the parties that brought the matter to it. If folks are concerned here today, it seems to me the decision there not to step

in is—would be consistent with concerns here that the Court not step in too quickly.

Senator GRASSLEY. Yes. Last and short question: Can—to you. Can Federal courts enjoin laws rather than specific parties? Why or why not?

Professor MASCOTT. Sure, Senator. Under Article III, the Federal judicial powers sends just the cases or controversies, so the Court's got to be acting against specific parties and specifically does not have the power to generally review legislation. Thankfully, we have legislative bodies that we can go to, to, you know, petition for policies to be reviewed and not look to the Court to answer every policy question for the country.

Senator GRASSLEY. Thank you. Mr. Chairman.

Chair DURBIN. Thanks, Chairman—former Chairman, or my friend, Senator Grassley.

Isn't this interesting? If you listen to what the witnesses have said and what's been said on the Republican side of the table, you wouldn't even know what the nature of S.B. 8 is. For them, it's just a routine Supreme Court procedural decision. It has nothing to do with the substance of the bill that was before the Supreme Court. You have to ignore the statement by Sotomayor that this was flagrantly unconstitutional, which ought to give special moment to a decision, whether it's going to be a shadow docket or a merits docket decision, wouldn't you think? To argue that this shadow docket is just routine, it just happens, nothing to see here, move along—the numbers don't tell that story.

Eight times, in 16 years, the shadow docket was requested and used by Obama administration and Bush administration. Eight times, 16 years. Then, when it came to the Trump administration, 36 times in four years, and the Trump Justice Department won in 28 cases. When Justice Breyer decides to write a book, and Justice Barrett decides to go to the McConnell Center in Louisville, Kentucky and argue that—no politics, we're just playing them straight, call them as we see them, and then you look at this. It defies description. Perhaps now some other Members on the other side will actually try to defend S.B. 8. I'm anxious to hear it, but so far, not a one.

Let me ask you, Ms. Howard. You were present at the scene of this legislative crime. When we talk about the liability under S.B. 8, it's been suggested that including categories of people who aid and abet in the performance or inducement of an abortion would be the clinic and its employees, doctors, receptionists, security guards, relatives or strangers who pay for the abortion, donors to Planned Parenthood, insurance companies—they're expressly mentioned in the statute—those, I suppose, providing transportation to and from the clinic, counselors, including clergy. If we're talking about the potential civil liability of a minimum of $10,000, was this discussed in the Texas House of Representatives, as to the number of people who would be inadvertently swallowed up in this law?

Representative HOWARD. It was absolutely discussed and debated, but to no avail could we get any change made to that. We have heard of multiple instances now of, for instance, Uber or Lyft drivers not being willing to take someone to a Planned Parenthood clinic. This is something that's—has an extreme amount of confu-

sion. People do not know if they're going to be held liable for even counseling. Those that are doing sexual assault counseling, in particular, are upholding what they know is appropriate to do in counseling those that come to them, the survivors, but are absolutely concerned now about what that's going to mean for liability for them.

Chair DURBIN. Long time ago, I used to be a practicing lawyer, filing civil litigation lawsuits, and this bill has something in it I have never seen before. The defendant has the burden to prove that they did not break the law. Not the plaintiffs proving that the law was broken. They've completely flipped the burden of proof. If I'm sued, now I have to prove that I didn't break the law. Think about that for a second. It's exactly the opposite of normal legal practice. The burden is on the accused, not on the accuser. Was that discussed when the Texas House of Representatives debated this law?

Representative HOWARD. Of course it was discussed, and we tried to make changes there, as well. The fact is that that's what I'm hearing from many physicians that I've spoken with, that they are talking about retiring, leaving the State. They are somewhat risk averse to begin with, and they're not going to risk their profession by being sued for something that they may not have even done. There is—it's absolutely chilling.

Chair DURBIN. There's no rape or incest exception in this law, correct?

Representative HOWARD. That's correct. That's correct.

Chair DURBIN. Except there's one reference to rapists that I can find, and that reference says that no exceptions for victims of rape to be able to sue under this law. The Texas House of Representatives decided, well, we aren't going to create an incest or rape exception, but wait a minute, we're not going to let the rapists turn around and sue under this law and recover from their own victims. Was that discussed in the Texas House of Representatives?

Representative HOWARD. Again, yes. We tried to amend that to get better coverage so that we would make sure that rapists were not allowed to sue at all. The fact is, though, that because there's no exception for incest and rape—is egregious on its face. What it also says to us is that in order for you to be protected here, if we're going to look at rape and incest, then we're saying you have to be assaulted first, in order to get your constitutional rights. This is really—the entire bill is just egregious.

Chair DURBIN. Thank you. I'm going to go off and vote. Senator Whitehouse is going to preside, and I believe Senator Cornyn is next.

Senator CORNYN. Thank you, Mr. Chairman. Mr. Chairman, I would think that if we're going to single out individual States and individual cities, that we can anticipate a future hearing on why the city of Chicago has the highest murder rates, among the highest murder rates in the Nation. I really think it's inappropriate for the Federal Government, for the Senate Judiciary Committee, to try to single out individual States, but you have, and so let's talk a little bit about this.

First of all, I would say this is part of a concerted effort, really a shameful broadside on the part of our Democratic colleagues to

attack judicial independence. If there's one thing that distinguishes the United States of America from other countries, it is the independent judiciary. When politicians decide to attack judges and courts, it's an unfair fight because the judges can't fight back. They're not going to go public and engage in a public debate about their practices and procedures.

It's clear that this is a part of a concerted effort to intimidate and bully the members of the Supreme Court. We saw that with the shameful remarks made by the Senate Majority Leader from New York, when he actually had a press conference in front of the Supreme Court and threatened two Justices with retaliation if they didn't rule the right way. We also have seen this with the efforts to—or the plans to pack the Court, to try to achieve a particular political result. Something that not even the liberal members of the Court have said would be a good idea, including Justice Ginsberg and Justice Breyer.

I think it's worth noting that, since we're talking about abortion, that the Declaration of Independence does say, "We hold these truths to be self-evident, that all men area created equal, and they are endowed by their creator with certain unalienable rights, and among these are life, liberty, and the pursuit of happiness." I would point out that since *Roe* v. *Wade* was decided, approximately 62 million innocent lives were denied what our Founders said was a self-evident, unalienable right to life.

During my time in the Senate, I proudly fought to outlaw abortions after 20 weeks of gestation, which is the time in which science tells us that an infant can feel pain. The U.S., of course, is currently an outlier in the international community. We are ranked right up there with North Korea and China as one of the most permissive countries in the world when it comes to elective abortions because abortion advocates deny the humanity of unborn, innocent life. I've also supported—after the Governor of Virginia, a physician, by the way, shamefully said that the appropriate care for an infant that was born alive is simply to let that infant die if it was unwanted, basically embracing infanticide. I was proud to support the effort to protect the rights of children who are born after botched abortions, but all of our Democratic colleagues voted against that.

[Poster is displayed.]

In the meantime, here's what our Democratic colleagues advocate. This is the bill that was passed in the House by Speaker Pelosi and House Democrats: prohibits States from outlawing abortion as a method of gender selection; undermines State efforts to protect unborn babies with disabilities, including Down syndrome; restricts State laws protecting a doctor's right to opt out of an abortion based on a religious or moral objection; requires States to allow elective abortions up to 40 weeks, based on one doctor's opinion. I would point out the Supreme Court has actually held that late-term, partial-birth abortions can constitutionally be prohibited, but not under Pelosi's abortion law. Finally, we give the Attorney General sweeping authority to block State laws protecting the right to life. Ms. Howard, if given an opportunity to vote yes or no on this bill, how would you vote?

Representative HOWARD. Senator, I have not read the bill. I am obviously part of the Texas legislature and would not have an opportunity to vote on that bill.

Senator CORNYN. I know you're part of the Texas legislature, but it seems like Texas Democrats are spending more time in Washington, DC. these days than they are in Austin, in spite of the special session. As I've described it to you, would you support this legislation or not?

Representative HOWARD. What I support is that this is a medical situation, a medical determination. It should be between a doctor and that doctor's patient. It does not——

Senator CORNYN. And does the——

Representative HOWARD [continuing]. Need to have Government interference.

Senator CORNYN. Does the unborn infant have any rights at all?

Representative HOWARD. I'm sorry?

Senator CORNYN. Does the unborn child have any rights whatsoever, in your opinion?

Representative HOWARD. You know, I think we can agree on the fact that there is potential life. I don't think that there's consensus, necessarily, around when life begins.

Senator CORNYN. The Supreme Court precedent which establishes viability roughly at 24 weeks—you're aware of the fact that when *Roe* was decided, viability was at 28 weeks, roughly, but due to advances in medical science, it's now—even a younger unborn child can be saved? Is viability any less arbitrary than some of these other events in a fetal development, like a heartbeat or a quickening, when the baby first is felt to move in a mother's—in the mother?

Representative HOWARD. Certainly there are ranges——

Senator WHITEHOUSE. [Presiding.] Senator Cornyn, you're well over——

Representative HOWARD [continuing]. Within which these——

Senator WHITEHOUSE [continuing]. Your time allotment, so we'll—let me let the witness answer, but please——

Senator CORNYN. If you'd let the witness answer——

Senator WHITEHOUSE [continuing]. Respect your colleagues who are waiting.

Senator CORNYN [continuing]. I'd appreciate it.

Representative HOWARD. Thank you. I'm saying that there are ranges in any kind of metrics that you're looking at, if that's what you're asking me.

Senator WHITEHOUSE. Senator Leahy is next in order. You've just come in. If you're ready to proceed, you may proceed.

Senator LEAHY. I am, and I appreciate that. I was able to listen to the things as we have been going back and forth. I guess everybody's been going back and forth for votes. Professor Vladeck, I'm sure you would agree—in fact, every lawyer would agree—that we should be able to trust that the U.S. Supreme Court will honor precedent and protect well established constitutional rights for everybody. But by allowing Senate Bill 8 out of Texas to go into effect, the Court, I believe, through its shadow docket, has caused irreparable harm to hundreds, if not thousands, who are now unable to obtain critical healthcare services. Of course *Roe* and *Casey* are

dead letter across the State of Texas, and that affects families working to make ends meet, young women of color. I'm not questioning the existence of the shadow docket. My concern is when it's used on very consequential cases that have nationwide impact and do it in the shadows.

Professor, your testimony discusses the frequency of applications for emergency relief and how the Court has granted emergency relief far more often in the last few years. What trends give you the most concern regarding the Court's growing reliance on the shadow docket?

Professor VLADECK. Senator, I think the most concerning parts of the trend, I think, are twofold. First, I think it's not the volume, by itself, but it is the extent to which the Court is treating these rulings as much more impactful than emergency rulings of the past. That instead of, you know, unsigned orders that don't have any analysis, that no one expects to have effect beyond the parties to that case, the Court has actually now gone out of its way to chastise lower courts for failing to follow unsigned orders. I think that really ups the ante for the significance of these rulings.

That goes, I think, to why many of the critics—or defenders of what the Court's been doing really have to mischaracterize what the criticisms are. It's not about the volume, and it's not about the fact that we need an emergency docket. There's not a lawyer out there who would dispute that. It's that what the Court is doing is having greater impact in ways that are inconsistent. That, to me, Senator, is where the S.B. 8 case really is a sharp point of relief. It's not just that the Court declined to intervene. If we had no significant shadow docket rulings over the last five years and the Court declines to intervene in the S.B. 8 case, I think this is a different conversation. It's against the backdrop of all the contexts where the Justices did intervene.

Senator LEAHY. I worry that it could cause people to lose faith in the Supreme Court, and I say that as one who's voted on more Supreme Court Justices than anybody in this room. In fact, I believe I've voted for more Republican nominees than any Republican on the Senate Judiciary Committee because I believe in the integrity and impartiality of the Supreme Court, but I'm afraid that view is being eroded.

I was thinking, listening to Representative Howard—tell me a little bit more. I, you know, was a former prosecutor and one who saw what happened when we had back-room artists involved with abortion, people I'd go after. They were doing, however, not—a nonmedical situation, and people died, and—to say nothing about a whole lot of other things that went on. Then I see delegating enforcement to everyday citizens. Cash bounties of at least $10,000 to bring suits, even if they're frivolous, against medical practitioners. Can you speak to the harmful effects of the private enforcement mechanisms on women and healthcare providers in your district—actually, across the State of Texas?

Representative HOWARD. Yes, sir. As I've said, it has a chilling effect on the services even being provided, at this point in time. The people who are working in the clinics are having to hire security guards to protect them. It's—there's this sense of pitting neighbor against neighbor, and I must say, it's a different issue, but this

is at the same time that Texas passed permitless carry, without any license required to carry a firearm, where we saw people coming up to abortion providers' clinics, right after this law went into effect, and bringing their guns and displaying them. It's absolutely creating much anxiety and fear among people.

Senator LEAHY. Thank you. Thank you, Mr. Chairman.

Senator WHITEHOUSE. Senator Lee.

Senator LEAHY. I'll submit my other questions for the record.

Senator WHITEHOUSE. The Senator's questions for the record will be accepted.

[The information appears as a submission for the record.]

Senator Lee.

Senator LEE. Thank you, Mr. Chairman. Right around the Washington Monument, there's a display. It's a fascinating display, visible from a distance. You can see white flags, the number of them is approaching 700,000, surrounding the Washington monument, each one of them representing one of the sacred, unrepeatable, infinitely valuable lives that have been lost to the COVID–19 pandemic in the United States. This is tragic, and it has me wondering about other flag displays that we could put up. Those are each represented by white flags, small ones. It looks like snow, from a distance.

What if we put up little red flags, each representing one of the American lives lost to abortion every year? It would be in the same ballpark, but every single year. Imagine further that—see, this roughly 700,000 figure for the lives lost to COVID, that's not just this year, that's this year and that year, it—last year. It's throughout the duration of this pandemic. What if we could show a red flag for every human life taken since *Roe* v. *Wade* was decided in 1973?

Let's be really honest about what this was. What this was, was a decision by the Supreme Court of the United States saying that a State may not exercise its sovereign police powers. Police powers—sort of broad power to protect life, liberty, and property. To protect health, safety, and welfare that State governments have and that the Federal Government decidedly does not. That the Founding Fathers willfully, intentionally withheld from the Federal Government because they were too important to be exercised at the national level. The Supreme Court of the United States says, no, no State may protect unborn human life. They decided that in 1973, nearly 50 years ago.

If we had a red flag for every human life that's been taken since 1973, and we put that around the Washington Monument, there wouldn't be room enough to hold all those red flags. I doubt there would be enough grass in the entire Mall, between the Capitol Building, the Washington Monument, and the Lincoln Memorial. Unlike snow, it would look like something else from a distance, look like something that it is.

Let's not dress this up in clinical terms that make it sound like something that it is not. We are talking about the taking of unborn human life, innocent life, life of a being that has a right to exist, life of a being that would cry out in pain if it had the capacity to do so, but we can't hear it.

If a Court is going to take that right away, a State, whose citizens regard that as being a morally consequential decision, let's—

setting aside for a minute questions about exceptions to restrictions on abortion, before we even get to those, if what we're saying is that a State effectively may not protect unborn human life—and make no mistake, that is what it is—sure, it underwent some changes, nearly 20 years after *Roe* was decided, with *Casey*—the effect is still essentially the same. We've made what was a State issue, involving general police powers for the protection of health, safety, and welfare, something we give to the States, we don't have in the Federal Government—we made it a Federal issue and a Federal judicial issue, thus insulating the law from the people, the one thing in our system of government you cannot do.

So, yes. Is Texas's law that they came up with unique? Yes. Is it different from other laws we've seen? Yes, it is. Is this surprising, at all, that the people of a State who love life would want to protect human life? No, it isn't, and who can blame them?

Look, I understand not everything that is a good idea in the wisdom of most of the voters in a State or in the wisdom of those they elect to make laws in their State will be constitutional. Yes, the Constitution is counter-democratic in some respects, in that it takes some things outside of the power and authority of a government. Sometimes the Federal Government, sometimes the States, sometimes both. Abortion is not on that list. I challenge any one of you to tell me what provision of the Constitution uses that term or refers to it, directly or indirectly. It cannot be found. No, they fashioned it from whole cloth, as if out of thin air. It's wrong. It's amounted to a betrayal of their oath to uphold the U.S. Constitution and to interpret it based on what it actually says rather than what they wish they meant.

As to the shadow docket, it, like any court in the United States, State or Federal or municipal—yes, the Supreme Court of the United States, where I served as a law clerk, has a motions docket. No court should—could exist without it. You wouldn't want one without it. Yes, in some circumstances, that motions docket involves emergency motions. To call that a shadow docket, as if to suggest that there's something shady about it or nefarious going on, is an illegitimate attempt to belittle the Court, to disparage it, to intimidate it, and to threaten it. This is sometimes what happens in advance of certain people feeling and fearing that members of the Supreme Court of the United States might actually rule in a way that doesn't benefit them, even if it's a ruling in favor of the Constitution. It's not appropriate. It's beneath the dignity of this Committee and of the U.S. Senate. We should not harass, threaten, or intimidate.

Finally, with regard to the ruling in this particular case that apparently prompted this hearing, there was no defendant properly before the Court to establish Article III standing of justiciability. One must have an injury, in fact, fairly traceable to the defendant, that's capable of being remedied by the Court. There was no defendant charged with enforcing this particular statute in that case.

Yes, I get the fact that for policy reasons—I get the fact that based on your interpretation of the way things should be—some of you believe that the Court should've just invalidated the whole law. That's not how our system works. They didn't have jurisdiction be-

cause they didn't even have a defendant. Thank you, Mr. Chairman.

Chair DURBIN. [Presiding.] Thank you, Senator Lee. Senator Whitehouse.

Senator WHITEHOUSE. I think it goes without saying that I have a rather different view of what is going on here than some of my Republican colleagues. There is a well-known practice of regulatory capture, where a powerful interest or industry essentially takes over a regulatory agency, and the regulatory agency then, thus captured, delivers decisions that benefit that industry that captured the agency. I suppose, sooner or later, it was inevitable that minds of an evil bent would take the stratagem of regulatory capture and apply it to courts and, in particular, to our Supreme Court.

Obviously one way you control an agency or a court is to control the appointments, and we know very well the Federalist Society turnstile that was run in the Trump administration that put three of these Justices on the Court. We know very well of the Judicial Crisis Network and its dark money funding, that's spent tens of millions of dollars, related to Supreme Court appointments, on advertising campaigns. What we don't know is who was behind all of this, who provided what The Washington Post described as $250 million in money to make all this happen. Two hundred and fifty million is a lot of money, and people don't spend that kind of money unless they want results. We have no idea, because of secrecy, who is behind this scheme.

The next thing, once you've captured an agency that you want to do is to tell it what to do. Sure enough, we see national right-wing litigation groups that bring cases to the Court. There is kind of an expedited fast lane for them to bring cases to the Court that they think the captured Court will rule for them on. Very unusually, they rush into court and say, "Your Honor, we'd like to lose. Please rule against me as quickly as possible so that I can get up to a friendly Supreme Court and we can get our policy work done there."

Then behind those groups that fly behind plaintiffs of convenience that they have worked to locate are flotillas of amicus curiae, friends of the court—amici curiae, I should say, is the plural—who come in an orchestrated chorus and tell the Court what the dark money groups behind them want in this decision. Again, we don't know who's behind them, because again, they're funded by dark money. The whole thing is just wreathed in secrecy, which is usually not a good idea. Most often, in a courtroom, people want to know who else is in the courtroom with them. A masked entity, a front group in a courtroom is a very un-American thing, in my view.

Of course, what you most want from capturing a regulatory agency or a court is results. Sure enough, we've tracked 80—80—partisan 5-to-4 decisions under Chief Justice Roberts that give clearly identifiable wins to big Republican donor interests. Eighty is a lot. I'm not a great lawyer, but I bet you that I could've taken a string of 80 to 0 and brought a pretty good bias and discrimination case based on that pattern of behavior. Eighty to 0 is the pattern of partisan 5-to-4 decisions with Republican donor interests involved.

It should probably come as no surprise, when you look at the 80 5-to-4 decisions, they fall into four major categories, as we pointed out. One is helping Republicans win elections. Another is attacking civil rights. Another is protecting the Republicans' corporate benefactors, particularly from liability. The fourth, of course, is pushing a far-right social agenda that they can't get legislators to vote for but an undemocratic Court will deliver for them.

It comes as no surprise that, when you look at what's been going on in the shadow docket, it's a pretty damn good match with the results that were produced from the capture of the Court in those 80 partisan 5-to-4 decisions. Again, helping Republicans win elections, taking away civil rights, protecting corporate interests—in this case, particularly landlords and polluters—and pushing a far-right social agenda such as the far-right social agenda that is represented in this case.

My time is expired, and I'll leave it at that. I thank the witnesses for bringing this before us, and I think that there are important questions here, we should be having this hearing, and I'm glad we are.

Chair DURBIN. Thank you, Senator Whitehouse. Senator Cruz.

Senator CRUZ. Thank you, Mr. Chairman. You know, the Senate Judiciary Committee is busy. They're not busy focused on the crisis on our southern border. In nine months, we've had zero hearings on the crisis on the southern border, even though 1.2 million people have crossed illegally and there's a public health crisis playing out, but Senate Democrats have no time to worry about that.

Senate Judiciary Committee is not worried about Big Tech censoring and silencing free speech. That is not a concern for big Democrats that are funded by Big Tech. No, instead their priorities are, number one, amnesty. There's no priority they care more about than amnesty. We've had four amnesty hearings this year. Number two, trying to intimidate the Supreme Court and Article III judges. That is a high priority. I have to say, the Senator from Rhode Island—I always enjoy his charts. I do wonder where the red yarn is, connecting one conspiracy point to the other.

I will say, this topic today on the shadow docket—this is—that is ominous. Shadows are bad. Like, shadows are really, really bad. Mr. LaCour—actually, General LaCour. You're a solicitor general, damn it. Let's use proper titles. General LaCour, the Senate Democrats have a point here. Before Donald J. Trump, the Supreme Court had never decided emergency motions, is that correct?

Mr. LACOUR. Any emergency proceeding whatsoever?

Senator CRUZ. Yes.

Mr. LACOUR. That's not correct, Senator.

Senator CRUZ. Wait a second. Before Donald J. Trump, every single case the Supreme Court decided was fully briefed and argued, isn't that right?

Mr. LACOUR. That would not be correct.

Senator CRUZ. That's—you mean they've decided emergency motions before the advent of the terrifying President from Trump?

Mr. LACOUR. Yes, before our 45th President.

Senator CRUZ. Professor Mascott, you clerked at the Supreme Court for Justice Thomas. Surely it must be correct that there was

no shadow docket, and you worked on no emergency matters during your time as a clerk. Is that right?

Professor MASCOTT. Senator, certainly the orders docket——

Senator CRUZ. You've got to turn your mic on.

Professor MASCOTT. Certainly, the orders docket's typical, and, yes, it's been around for a very long time. On the jurisdictional points, *California* v. *Texas*, just last term, 2021, Justice Breyer actually underscored what the Court said again in this most recent ruling here, which is, folks need to have standing—and can provide remedies only against parties, not general concerns about bills.

Senator CRUZ. You know, there's an old line that hypocrisy is the tribute that vice pays to virtue. The Democrats are fond of concocting ominous terms. Dark money is one of their favorites, and I mention hypocrisy because the Democrats receive far more dark money than Republicans. While they're shoveling in hidden money from giant donors, they complain, "Hidden money from giant donors is a terrible thing." Then they come up with the shadow docket, which I suppose dark money ought to cast a shadow. Although, actually, it ought to be light money, I suppose, if it's casting a shadow.

What they're calling a shadow docket is the ordinary operation of every court that's been in existence since the ratification of our Constitution, whether a district court, a court of appeals, or the U.S. Supreme Court, if there's a motions docket. The motions docket is handled on the motions docket. That has been always the case.

When I was a clerk at the Supreme Court, I remember every damn execution in the country. The clerks are there until late at night, and many of the States have executions at midnight. On the West Coast it would be three in the morning, and you'd have the clerks there till three in the morning, dealing with the emergency motions that every time there's an execution, 30 minutes before the execution, you get something. At the time I was clerking, they were faxed in. Professor Mascott, you probably don't know what faxes are. They weren't there when you were clerking. It would be an emergency appeal at the end, and strangely enough, you'd call your Justice and wake up your Justice at midnight or one or two in the morning, to cast a vote on the emergency appeal filed at the very end, to try to delay the execution. This whole notion of a shadow docket is called an operating court that is deciding emergency motions.

Look, what this is really about is trying to demonize Texas and trying to demagogue on the question of life. When it comes to demonizing Texas, I suppose I can understand the incentive of Senate Democrats to do so. Chairman Durbin is from Illinois. I just looked up the statistics in the year 2020 of what States people are moving out of. The number one State is New Jersey. The number two State is New York. The number three State is Illinois. Illinois did better. A year ago, it was the number two State for people fleeing. Last year, it was number three. Illinois is doing better.

Where do the people from Illinois go? Clearly they don't go to the hellholes like Texas or Florida. No, actually, that's exactly where they go. They go to Texas and Florida. Why? Because we actually have jobs there. We have low taxes, and we protect people's rights.

Look, today's Democrats on the question of abortion are radical and extreme. Their position: they support unlimited abortion on demand up till the moment of birth, partial-birth abortion, with government funding, with no parental consent and no parental notification. It is radical. It is extreme. Nine percent of Americans agree with the positions of every Democrat on this Committee because they have handed their abortion agenda over to the radical left.

Texas made a perfectly reasonable decision to protect life. Life is valuable. You know, I would note the Texas law triggers when the unborn child has a heartbeat. The last I checked, clumps of cells don't have heartbeats, but the extreme Democrats don't want to talk about that. Instead, they concoct a hearing on ominous Texas, ominous shadow dockets, all of which is political theater, none of which is addressing the real issues people care about.

Chair DURBIN. Senator Booker.

Senator BOOKER. Thank you very much, Mr. Chairman. This is clearly a issue that there's a lot of very different and strong beliefs on both sides. I find it shocking to the conscience that a woman who was repeatedly raped, doesn't even know that they're pregnant, could have the government swooping in to tell them what they can do with their body. When we know all the challenges that often women face just accessing healthcare at all—we know we are a nation that does not take care of low-income women, in particular, in terms of their access to healthcare, and abortion care is healthcare—it could often be going directly to the life of a woman or a birthing person.

I find it difficult when I see people talking about the sanctity of life and what happens to women who do not have adequate care. We're a nation that has one of the highest maternal mortality rates of developed nations, with African-American women being four times more likely to die in childbirth than white women. It seems stunning to me that there are so many things that we could do that elevate human well-being that preserve life. We know that women who are afforded healthcare and family planning have lower rates of unwanted pregnancies. You say that's a fact, correct?

Representative HOWARD. Yes, indeed.

Senator BOOKER. In fact, Colorado reduced their weight—rate of young women having abortions.

Representative HOWARD. That's correct.

Senator BOOKER. By 40 percent. Not by attacking women, not by taking away healthcare, but by giving them more reproductive freedoms. The stunning thing to me is that we know what would elevate human life and well-being, if we invested in and empowered women with doula care, with healthcare, with reproductive freedom, with science-based sex education. Did the Republican majority in Texas consider bills about any of those things that are factually connected to lowering rates of unwanted pregnancies?

Representative HOWARD. Senator, I've had legislation for the past several sessions to ensure that those that are on CHIP can have access to contraceptives, in terms of reimbursement, as is done in every other State except one, and I have not been able to get that passed through our legislature.

Senator BOOKER. Can a wealthy woman, under this law, a wealthy person in Texas, have access to abortion care?

Representative HOWARD. Yes, sir, she can. She can travel out of State.

Senator BOOKER. Right. Who's most affected by a law like this?

Representative HOWARD. Those that do not have the means, those that have limited means, people of color. The fact is, too, as you point out, significantly more chance of death by carrying a pregnancy than there is by having an abortion—and disproportionately impacts women of color.

Senator BOOKER. That's what gets me is if you value life, you're creating an environment where you're putting lives at more risk than other alternatives that are empowering individuals. I recently just spent time doing research about what women are listing, who terminate a pregnancy, what reasons they're listing. One of them, I—depending on the study, is the fact that women are 400 percent more likely to plunge into poverty. They mention financial issues. Are there—is there legislation coming out of the Republican majority to help economically empower women of birthing age who choose to have children or improve the childcare system, foster care system, or anything like that?

Representative HOWARD. We have continued to underfund all of the things that you mention, and absolutely, to your point, valuing life means valuing the lives of the women who are asked to carry these pregnancies.

Senator BOOKER. Poverty, healthcare, the kind of healthcare that shows you from doula care to access to family planning—those things are not being invested in. Those things are not being valued. Wealthy folks can get access to this care, but the lives, the dignity, the well-being, the health of low-income women and birthing people—in your opinion, are those—not through rhetoric but through substantive laws we know could elevate their well-being, is that—are those the things that are being attended to?

Representative HOWARD. Senator, I'm a lifelong Texan. I love Texas. I am not here to bash Texas. The fact is that we have a lot of work to do that we haven't been doing. We have the highest number and rate of uninsured in the entire nation. We have refused to expand Medicaid coverage. Half of the births in Texas are to Medicaid moms. We are not investing in those things we need to invest in to support women and their families.

Senator BOOKER. Thank you very much.

Representative HOWARD. Thank you.

Senator BOOKER. Professor Vladeck, forgive me, I didn't go to a law school, I went to Yale Law School. I just want to—can you clarify something for me? Because I fully concur that some of my friends on the other side of the aisle are probably better lawyers than me. My friend, my dear friend, someone I value quite a bit, Senator Lee, said that the Supreme Court did not have jurisdiction because there was no proper defendant. I'll take my question with my mic off. I know my time's expired, but could you answer that, please?

Professor VLADECK. Sure, Senator. I mean, I suffer from the same disease of what law school I went to, but I will say, I mean, I think the—there have been various mischaracterizations from, I think, both witnesses and Senators today about what was before the Supreme Court. The providers were not just seeking an injunc-

tion against the eight defendants, at least two of whom—I think if we had time, we could talk about why they were entirely proper defendants. The providers were also asking to lift the emergency stay that the Fifth Circuit had imposed that had actually blocked the district court from answering some of the procedural questions that Senator Lee and Professor Mascott have suggested deprived the Court of jurisdiction.

I think the story about the S.B. 8 case, Senator, is a little more complicated. The notion that the whole matter rose and fell on whether all eight of the named defendants could be subject to an injunction by the Supreme Court misses all of the different things that providers were asking for, short of an emergency injunction, and it also misses the Fifth Circuit's role in provoking the emergency by stopping the district court from holding the hearing it was planning to hold on Monday morning, August 30th, that would've given it a chance to consider those questions, to actually resolve them, to build the very record, the absence of which the majority relied upon in its short ruling.

Senator BOOKER. You have redeemed our alma mater. Thank you very much. Thank you, Mr. Chairman.

Chair DURBIN. Thank you, Senator Booker. The Republican staff advises me—Senator Blackburn, then Senator Cotton, then Senator Hawley. Senator Blackburn.

Senator BLACKBURN. Thank you, Mr. Chairman, and thank you all for your opening statements and for your time today. Ms. Goss Graves, I want to come to you. In 2019, you were before the House, and you stated, and I'm quoting you, "The legislators passing restrictions on abortion want to control the lives and futures of women, denying them equality." Let me ask you this. Do you believe that having children negatively impacts the lives and futures of women? That having children somehow makes them unequal?

Ms. GRAVES. You know, I believe, Senator, that the ability to determine when or whether you have children or how you parent those children is fundamentally tied not only to your personal liberty and privacy but your ability to be truly equal in this country, your ability to participate in our economy, your ability to participate in society, your ability to participate in our politics, to be seen as equal citizens. That's one of the things that has me——

Senator BLACKBURN. So——

Ms. GRAVES [continuing]. So upset about——

Senator BLACKBURN [continuing]. What you're saying is, women cannot be considered equal unless they have access to abortion.

Ms. GRAVES. For sure. We are in day 29——

Senator BLACKBURN. So——

Ms. GRAVES [continuing]. Where people in the State——

Senator BLACKBURN [continuing]. You believe——

Ms. GRAVES [continuing]. Of Texas no longer——

Senator BLACKBURN [continuing]. That even——

Ms. GRAVES [continuing]. Have those same freedoms.

Senator BLACKBURN [continuing]. Though a child, an unborn child, has a heartbeat, that that woman is not considered equal unless she can terminate the life of that child?

Ms. GRAVES. I believe the ability to control your body, your life, your future, your destiny——

Senator BLACKBURN. So you——

Ms. GRAVES [continuing]. Is bound up with your ability——

Senator BLACKBURN [continuing]. Do not have that control unless you have——

Ms. GRAVES [continuing]. To be equal in this country.

Senator BLACKBURN [continuing]. Unfettered access to abortion. Is that what you're saying?

Ms. GRAVES. The Supreme Court has actually outlined a framework that has been reaffirmed, again and again, for 50 years, around exactly how to consider this question, and I understand that in——

Senator BLACKBURN. You think abortion is——

Ms. GRAVES [continuing]. This room, there are disagreements——

Senator BLACKBURN [continuing]. Essential for equality. Ms. Howard, let me come to you. In direct response to pro-life policy victories like the Heartbeat bill, the House passed the Women's Health Protection Act. The way I look at it, this is a radical piece of legislation that goes a lot further than just codifying *Roe* v. *Wade*.

One of the most reprehensible provisions is the ban on informed consent requirements and requirements that women be given the opportunity—not mandated, but just given the opportunity to view an image of their unborn child or listen to that child's heartbeat. As the sponsor of the Women's Right to Know Act, I am stunned that such a bill that purports to protect women's health would include such a prohibition. Doesn't a woman have the right to know about the medical risk associated with an abortion procedure, and doesn't she have a right to know the gestational age of that unborn child before she makes that decision to have an abortion?

It's not saying she can't have an abortion. If she wants one, she can have an abortion. She would have the right to know what she was getting into, basically. The risks that are there. That she would have the right to know the gestational age of that baby. And—you got any thoughts on that?

Representative HOWARD. We have a requirement in Texas for the distribution of a right-to-life—or right-to-know, I'm sorry, a right-to-know pamphlet, booklet, that is required to be distributed to everyone who comes in seeking an abortion. The problem that I would have with that is that it's medically inaccurate. I think that if we're going to be giving information that we want to ensure that we're giving the information that is medically accurate and, again, getting back to the physician-patient relationship, rather than the government interfering and dictating things that are not based in science.

Senator BLACKBURN. Do you—have you ever seen a 3-D ultrasound?

Representative HOWARD. I have.

Senator BLACKBURN. Tell me how you respond when you see a 3-D ultrasound.

Representative HOWARD. I'm not sure what your question is about.

Senator BLACKBURN. What kind of emotion does it evoke for you?

Representative HOWARD. The—I've seen a picture of someone's 3-D ultrasound. I think that the issue here, again, is what we are talking about is not—we're subjecting women to a transvaginal sonogram prior to when it's medically recommended——

Senator BLACKBURN. Okay. Let me——

Representative HOWARD [continuing]. That they have that.

Senator BLACKBURN. Let me tell you where I am on this.

Representative HOWARD. Okay.

Senator BLACKBURN. I think that with—that science is on our side, when you talk about life, and I have a lot of friends—I'm a grandmom.

Representative HOWARD. So am I.

Senator BLACKBURN. I have children and grandchildren. I have three grandchildren. There are so many of my friends that used to say, "Well, you know, I'm pro-choice," and then their daughter or daughter-in-law has a sonogram, 3-D. They can see the images. They can see—they know if they're having a girl or a boy, and they begin to make those plans. They begin to decorate those nurseries. They celebrate this life, because they can see those features. For me it was a joyous moment. My second grandson—I looked at those features, and I thought, "Oh, my gosh, he's going to have my eyes."

That is where science comes into play on this. That is where a policy that you have supported, that goes so far beyond *Roe* v. *Wade*. I understand you did it because it was a—kind of a kneejerk reaction——

Representative HOWARD. I'm not sure which policy——

Senator BLACKBURN [continuing]. To——

Representative HOWARD [continuing]. You're referring to.

Senator BLACKBURN. Excuse me. It was kind of a kneejerk reaction to a bill that was brought forth that you didn't like. I get that. You know, I do think we have to look at the fact that science is on our side on this. I yield back.

Senator WHITEHOUSE. Mr. Chairman.

Chair DURBIN. Thank you, Senator. Senator Whitehouse.

Senator WHITEHOUSE. May I interject for one moment to ask that the report that we put together, Captured Courts: The Republican Judicial Assault on Reproductive Rights, be entered into the record of the hearing?

Chair DURBIN. Without objection.

Senator WHITEHOUSE. Thank you.

[The information appears as a submission for the record.]

Chair DURBIN. Senator Hirono. It's not on. Try it now.

Senator HIRONO. Okay. I think it's on now.

Chair DURBIN. Yes.

Senator HIRONO. Thank you. I want to start with something that the Mississippi Attorney General Lynn Fitch said because the Supreme Court is going to be hearing the Mississippi case. The Mississippi attorney general recently claimed that overturning *Roe* v. *Wade* would somehow empower women to pursue careers and raise children. I wanted to see if Ms. Ross—Goss Graves, sorry, Representative Howard, whether either of you have any comments about that kind of statement, that women would somehow be empowered if *Roe* v. *Wade* were overturned.

Ms. GRAVES. Today women are empowered to participate in the economy. I think overturning *Roe* v. *Wade* would have the opposite effect of diminishing their ability to work when they want to work, to space their children when they want to space their children. If there is interest in furthering women's participating in the workforce, there are a range of policies that actually do that, like childcare, for example.

Senator HIRONO. Representative Howard, do you have anything to add?

Representative HOWARD. I would agree with what was just said. The fact is that, as I said in my opening, I came of age before *Roe* v. *Wade*, and I'm well aware of the obstacles that women had in making educational and employment choices for themselves if they found themselves pregnant and did not have many options other than to carry that pregnancy to term. It prevented them from their very destinies.

Senator HIRONO. She goes on to say that women would be more empowered because there are numerous laws enacted since *Roe* addressing pregnancy discrimination, requiring leave time, assisting with childcare, and more. I would be really surprised, frankly, if Mississippi provided any of those kinds of programs or protections.

For Professor Vladeck, what effects do late-night, unsigned, terse rulings like the one the Supreme Court issued in the Texas case have on judicial transparency and accountability, and how does this affect litigants' strategies and reliance on prior court decision?

Professor VLADECK. You know, it's——

Senator HIRONO. Can you just briefly——

Professor VLADECK [continuing]. A fair question, Senator, and I think that the tricky part is, we don't know. We have rulings that the Supreme Court hands down that have no majority opinion. I cite a couple of them in my testimony. Then lower courts read them one way or the other, and the Supreme Court chastises the lower courts that they think read the unexplained ruling wrong.

I think that's—you know, it's—again, just to sort of respond a bit to Senators Lee and Cruz, this is—the shadow docket is not new; the emergency docket is not new. What is new is how much more the Court is doing with it and how much it's expecting, Senator, parties, lower courts, all of us, to understand what these cryptic rulings mean.

Senator HIRONO. Have you done a sort of an analysis of the kind of decisions that the Supreme Court is making, using the shadow docket process—well, it's not even a process——

Professor VLADECK. Yes, I mean—so, I——

Senator HIRONO [continuing]. That was decided?

Professor VLADECK. You know, I realize that my written statement's pretty long, but on page 5 there's a chart that actually documents how many more of these rulings granting emergency relief there have been in the last couple terms. This term, there were 20. That's the most that I've tracked for as long as the Court has been deciding these cases as a full Court. The average during the first 10 years of Chief Justice Roberts' tenure was about five. And——

Senator HIRONO. No, I understand that. I'm sorry, I'm running out of time, but——

Professor VLADECK. Yes.

Senator HIRONO [continuing]. Basically I want to know if there is any kind of an ideological thing going on with the use of the shadow docket.

Professor VLADECK. Yes. I mean, they've been—so, I—yes, I mean, I think the shadow docket rulings have been far more homogenously ideological than the merits docket. Just one example, Senator: There were, I believe, 69 rulings on the shadow docket this term from which at least one Justice dissented. There was not a single one where a Justice to the right of the Chief Justice joined a Justice to the left. These are all breaking down on what we might call the classic ideological grounds.

Senator HIRONO. We see a lot more of these kinds of orders after the three Supreme Court Justices of the—President Trump's Justices. I just have one question for Representative Howard. Does Texas have any other laws where enforcement of the law is left to vigilantes and $10,000 in bounty money for them?

Representative. HOWARD. Does it have any other law that does that? Is that what you're asking me?

Senator HIRONO. Pardon me?

Representative HOWARD. I'm sorry, were you asking me, does that—does it apply to any other——

Senator HIRONO. Does Texas have any other laws besides——

Representative HOWARD. No.

Senator HIRONO [continuing]. This law where they actually let bounty hunters go out and enforce the laws?

Representative HOWARD. This is the only one I'm aware of.

Senator HIRONO. Why do you think that is?

Representative HOWARD. I think it was a scheme to get around judicial review and to ensure that, whether it was ever followed through with or not, there would be this immediate chilling effect, which has occurred, where basically abortions are not being provided because of the fear of the liability. It achieved the purpose, I think, that was intended.

Senator HIRONO. Do you think Texas would ever have a similar law where you could go after people who own guns and let the private sector—let private citizens enforce going after people who own guns, and you get $10,000? Do you think Texas would ever enact such a law?

Representative HOWARD. Those kinds of scenarios have been suggested. I have a hard time imagining Texas enacting that particular one.

Senator HIRONO. Yes. I think that's a rhetorical question, at this point. Thank you.

Chair DURBIN. Thank you, Senator Hirono. Senator Cotton.

Senator COTTON. I have to say I'm amused by the title of today's hearing, the Supreme Court's Shadow Docket, as if these cases are happening in some dark, shadowy, nefarious place in the Supreme Court Building, where the Justices are doing something illicit like maybe actually reading the Constitution of the United States. Let's look at some of the cases that have resulted in this shadow docket in recent years, cases where you have radical judges, usually in places like Hawaii or Seattle or San Francisco, where a single radical judge issues some nationwide injunction to prevent the former administration from building a wall to secure our southern border

from the millions of illegal migrants who have poured across it this year or maybe blocking travel from countries that are rife with terrorists and have no way to vet those travelers.

I don't know what else they did in the Trump administration. Maybe some judge in the Ninth Circuit ordered Donald Trump to bring Qasem Soleimani back to life and to apologize for killing Iran's terrorist mastermind. Or look at some of the cases on the shadow docket in which you had radical governors in places like Nevada and California who would block Christians from going to church to worship God, while they allowed liquor stores, marijuana shops, and casinos to stay open. I'm not saying those things should've been closed. I'm saying they all should've been open, to include churches, where people of faith could go worship.

Look what liberals want to happen on the shadow docket. They want the Supreme Court to enjoin cases in which the lawyers in the lawsuit can't even find a proper defendant to be sued. I know our Democratic friends think this shadow docket is something extraordinary and novel and unprecedented. Maybe it's the case that the lawsuits are so frivolous that they don't even merit an oral argument and full briefing. Or maybe this entire hearing is to distract from the radical law that just passed the House of Representatives last week, the most extreme pro-abortion measure to ever pass the Congress.

The Democrats over there, all but one of whom voted for it, argue that this bill merely codified *Roe* v. *Wade*. Would that that were so. *Roe* v. *Wade*, though wrongly decided, at least acknowledged—at least acknowledged our people's legitimate abiding interest to protect innocent life before a child is born. The law that passed in the House of Representatives, though, last week allows abortion to occur up until the very moment of birth, 40 weeks or even beyond, displaying a grotesque indifference to the most vulnerable kinds of human life.

I remember when my son was in the NICU. It was adorned with photos on the wall, matching, on the one hand, a small child that had been born at 30 weeks or 28 weeks or even 23 weeks. Sometimes so small it was held in the palm of a doctor, to the picture of that child at age 5 or 7 or 11, riding a bike, performing in a ballet, running through a field of flowers, all of whom would've been subject to the most grotesque and abusive kinds of abortions under the bill the House of Representatives just passed.

The Democrats have come a very long way on the question of abortion. All you have to do is look at Bill and Hillary Clinton's position on the question to see how radical they have become. Bill and Hillary Clinton, Hillary as recently as 2008, in her failed Presidential campaign, said that abortion should be safe, legal, and rare. Not many Democrats would say that today. Ms. Howard, would you agree with Bill and Hillary Clinton that abortion should be safe, legal, and rare?

Representative HOWARD. I would think that there's a lot of options that we could put in place that would limit the need for abortion, in terms of supporting healthcare for women, access to contraceptives, making sure that they have insurance coverage or Medicaid coverage. There are many things that we could do that would give them more of a choice in their own—how they have

healthcare, so that they don't necessarily have an unwanted pregnancy, but when they do have one, I think they have a right to make the decision about whether or not they want to continue that pregnancy.

Senator COTTON. Ms. Howard, my question was simple. Do you agree with Bill and Hillary Clinton that abortion should be safe and legal and rare? Your unwillingness to say yes just demonstrates my point, case closed, that Democrats today will not concede what Bill and Hillary Clinton conceded, that abortion should be rare, because it implies that there is something wrong about the practice. That there is something wrong about ending an unborn life up to the point of birth at 40 weeks. It is wrong, and the Democrats will no longer recognize that it is wrong.

Chair DURBIN. Senator Blumenthal.

Senator BLUMENTHAL. Thanks, Mr. Chairman. I understand that a number of my Republican colleagues have suggested earlier that we ought to have a hearing on the Women's Health Protection Act. Perhaps they would be surprised to know that we actually have had a hearing on the Women's Health Protection Act in this Committee. It was held by my Subcommittee on June 16th, I'm proud to say.

Senator Cruz can certainly attest to the fact that we had that hearing, and at that hearing, we discussed many of these same issues. It was before the crisis raised by the U.S. Supreme Court in indicating that *Roe* might well be overturned, and I would invite my colleagues to have a look at the transcript but, more important, to consider seriously the issues that we raised and the need that was demonstrated to protect *Roe* v. *Wade* and reproductive rights against the onslaught of State law restrictions, which are unprecedented, absolutely unprecedented in our history.

Reproductive rights are under attack, an onslaught as never before since *Roe* v. *Wade*. I clerked for the Supreme Court Justice who wrote it, shortly after *Roe* was handed down, and we never, ever could have anticipated the hundreds of State-level restrictions being proposed and enacted throughout the country.

Representative Howard, you've spoken about the ways that the Texas law is a violation not only of constitutional rights to abortion but also our legal and medical systems. As you've explained, under S.B. 8, a rapist could sue a doctor if they provide an abortion to a rape survivor. If you process the insurance paperwork for an abortion, you could be sued. You could be sued if you so much as respond to a friend in Texas with the location of an abortion clinic out-of-State. If you drop your sister off at a healthcare clinic where she has an abortion, you could be sued, again, by anyone in the entire United States. Just weeks after the Supreme Court's decision, we're already hearing tragic stories of women coming into Texas clinics for abortion care and being turned away because of the 6-week ban.

Let me ask you, Representative Howard, you testified repeatedly today about the dramatic impact that S.B. 8 is already having on the ground as women are forced to leave the State without the support of others, backing up waiting periods for abortion in surrounding States. What is the situation like for people who cannot travel, people who cannot travel because they lack the means and

wherewithal, and who are they? People of color? People who are poor? Those are the people, but really all people that are intended to be protected by the Women's Health Protection Act, which I am proud to be the lead co-sponsor of. Representative Howard?

Representative HOWARD. You articulated accurately that the majority of those who are not able to access an abortion out of the State are going to be those that do not have the resources, who live in our rural communities, who can't find childcare or take off from work. This disproportionately impacts women of color. Certainly what's going to happen here is, being forced to maintain a pregnancy and carry it to term, that was not something that they wanted to do, is going to result in further burdening that particular family in terms of their economics and their opportunities, will further put them into poverty, will increase the burden on the local—on the Texas taxpayer, as well. As I said before, over half of the births in Texas are to Medicaid patients, and women do get Medicaid when they're pregnant, in our State, so very likely we would see increased cost to the Medicaid program, as well.

Senator BLUMENTHAL. Thank you very much. Thank you, Mr. Chairman.

Chair DURBIN. Thank you, Senator Blumenthal. Senator Hawley.

Senator HAWLEY. Thank you very much, Mr. Chairman. I have to start by confessing a bit of confusion over today's hearing, particularly the title, which links together Texas's abortion ban and the role of the shadow docket. What mystifies me about this is that the emergency docket, the motions docket that we're talking about, the so-called shadow docket—I thought the complaint about the shadow docket—and, by the way, I clerked at the U.S. Supreme Court. I remember well the motions docket and how it works and the emergency aspect to it.

I thought the complaint and concern about that were the summary reversals and the orders that the Court supposedly issues when they intervene in cases, when they grant emergency injunctions without the benefit of full briefing, opinions, et cetera. In the Texas case, the Court simply refused to act. They didn't intervene. The Court didn't use a summary reversal. They didn't insert themselves at all. They just let the normal course of the law proceed.

It's a strange complaint about the shadow docket that the Court didn't do, in this case, what liberals wanted it to do. Didn't reach out to insert itself and issue an emergency order in the way that the left wanted. Which brings me, I think, to what this hearing's really about. This hearing's not really about that case at all. This hearing is really about the Dobbs case, Mississippi case. Senator Hirono did us the favor of reading from statements made by the Mississippi attorney general, who is, by the way, a woman, regarding that State's position in the *Dobbs* case.

This is plainly an attempt to intimidate the U.S. Supreme Court ahead of this case. Oral argument's to be heard, I think, on the 1st of December. Unfortunately, there's a pattern of not only this Committee, but of Democrats in this body doing so. Just last year, Chuck Schumer went to the steps of the Supreme Court and directly threatened Justices Gorsuch and Kavanaugh by name. He called their names out and said, "You won't know what's hit you if you don't change direction." Basically, if you don't rule the way

that we want you to rule. Of course, then he later came out in favor of court packing.

Members of this Committee, Senator Whitehouse, filed a brief with the Court in which he explicitly threatened the Court with restructuring, I believe was the term of choice, unless the Court ruled the way he wanted them to rule. That's what this hearing is about. This hearing's about threatening an institution of our Government to rule the way the extreme left of the Democrat party wants it to rule.

I say extreme left advisedly, deliberately. Let's talk for a second about the bill that the House of Representatives, the U.S. House of Representatives, just passed last Friday. This remarkable piece of legislation would mandate partial-birth abortion across our country, all 50 States. Mandate it.

Partial-birth abortion. What am I talking about? Let's just be explicit. This is from the Supreme Court of the United States, their opinion in the Gonzales case, 2007, *Gonzales* v. *Carhart*. I quote, "Dr. Haskell went in with the forceps and grabbed the baby's legs and pulled them down into the birth canal. Then he delivered the baby's body and the arms, everything but the head. Then the doctor stuck the scissors into the back of his head, and the baby's arms jerked out. The doctor opened up the scissors, stuck a high-powered suction tube into the opening, and sucked the baby's brains out," end quote.

That—that—is what the House of Representatives just voted to codify as the law of the land. That procedure. A procedure that is favored by almost no Americans. A procedure that bipartisan majorities banned in 2003 in this body. And now the House Democrats, and apparently all the Democrats in the Senate, want to bring it back and mandate it nationwide, reflecting the moral sensibility of the brutalist regime in North Korea.

This is the ethics of North Korea on display. Killing a child as she is already out of the womb, for heaven's sake. She's already mostly delivered. Sticking scissors into the back of her head and sucking her brains out. That is a quote from the U.S. Supreme Court. That is what is on offer. That is the platform of today's Democrat party in this body. It is absolutely extraordinary.

That's what today's hearing's about. They want to intimidate the Supreme Court of the United States to rule the way they want them to rule. They want to enact the most radical, pro-death legislation and agenda in our country's history, the most radical assault on fetal life, on unborn life—in the case of partial-birth abortion, on life that is already—a baby that's already delivered. They want that to be the law of the land. They're voting for it.

I look forward to voting on this in the U.S. Senate. We ought to put every Senator on record in this body. We ought to vote on this bill. Let's vote. We ought to mark it up in this Committee. Let's do it. I want to know. The American people deserve to know which Senators support the delivery and killing of children, out of the womb. Let's find out. Let's find out.

I urge this Committee to bring this legislation for markup. I urge us to vote on it, and then we should vote on the floor. The American people should see what it is that today's Democrat party is proposing. I think they would be absolutely revolted and appalled,

but it's time, as they say, to call the question. Thank you, Mr. Chairman.

Chair DURBIN. Senator Padilla.

Senator PADILLA. Thank you, Mr. Chair. Back to the item that is before us. When it comes to accessing safe reproductive healthcare, we've seen that a patchwork approach simply won't work. In fact, the trend that we've seen in healthcare more broadly is to work toward more seamless comprehensive healthcare services, not a patchwork, whether it's physical health, whether it's mental health or anything else. Sadly, just as with the assault on voting rights, it—we're observing State legislatures across the country resolutely focusing on overturning *Roe* v. *Wade*. With S.B. 8, Texas has effectively done just that.

No, we cannot rest in comfort, believing that *Roe* will continue to serve as a barrier for State legislatures. Instead, we must ensure that there is a statutory right for providers to provide abortion and reproductive healthcare and that patients continue to receive that care when they choose, free from unnecessary restrictions. Simply put, this body must pass the Women's Health Protection Act and the EACH Act.

My first question, for Ms. Graves, *Roe* is theoretically still in place, however, restrictions to care already exist in some States, even while *Roe* stands. Leaving S.B. 8 aside, can you give us a few other examples of the restrictions to abortion people face in States that are hostile to abortion care?

Ms. GRAVES. There are several categories. You know, there are other bans at different points in pregnancy that have been passed in other States that have been consistently struck down because of *Roe*. There have been delays. You know, waiting periods. Requiring people to wait a certain number of days, so pushing access to abortion care further into your pregnancy. There have been efforts to shame people who are having an abortion. You know, medically inaccurate, shame-based scripts that providers are required to read.

You know, and there are also things that have basically shut down clinics, so that in much of the South, many, many people have to drive hundreds and hundreds of miles, already, to access care. All of that is on top of the fact that many people—if you are covered by Medicaid, for example, the Hyde restrictions mean that abortion care may be financially out of reach. You know, if you're thinking about someone like me, who—you know, I frankly could afford to leave my State. I'm thinking about, it's day 29, and the many, many people who wake up desperate today in Texas who are wondering what options they have.

Senator PADILLA. Yes. Thank you. Just to sort of build on that, a recent New York Times article highlighted one of the—Oklahoma's four clinics that now has Texas residents making up 66 percent of their patients. I know we've touched, earlier in the hearing, on what the impact of such an influx of patients can bring to—whether it's this clinic in Oklahoma or others surrounding Texas—not only from a staffing concern for clinics, but it places an enormous amount of stress, to your point, on residents of Texas who can't afford to travel that distance, when that distance is prohibitive.

For those women, carrying their pregnancies to term, while that would not be their preference, that may be their only option. Can you explain what the lifelong effects are of carrying an unwanted pregnancy to term?

Ms. GRAVES. You know, I'm going to have to, I guess, put aside some of just the human dignity pieces of that, right? Like your ability to control your body and determine for you—there is a piece about that dignity that would carry for any woman of any means, but for people who are especially low income and who already lack consistent access to healthcare. The thing that worries me the most is—are also maternal and infant mortality crisis, which is heightened in Texas. When you add on that what we know about people and our ability to be able to be economically secure and to thrive, I'm deeply worried about what is happening right now, today, and about the copycat laws that are pass—that are going to come up and likely will pass, as people have been inspired by Texas. We are in both a public health emergency in this country and also a constitutional crisis, and it keeps so many of us up at night.

Senator PADILLA. All right. If I may, Mr. Chair, I know my time is up, but one additional legal question for Mr. Vladeck: Texas's S.B. 8 not only deputizes, it incentivizes private individuals to sue abortion providers and anyone helping a person obtain an abortion after 6 weeks of pregnancy. By shifting enforcement from State officials to private individuals, the State is attempting to evade legal accountability and prevent the Federal courts from blocking this unconstitutional ban. Can you talk more about how S.B. 8 was intentionally designed to create such procedural traps?

Professor VLADECK. Sure. I mean, Senator, really briefly, because I know that the time is short—there's an en banc Fifth Circuit ruling from 2001 that specifically opens the door to this by saying that it's not—State officers, the attorney general, the Governor, are not proper parties in pre-enforcement suits if they're not in charge of enforcing. Senator, if I may, I actually think that really underscores why the conversation about S.B. 8 is about so much more than abortion.

I mean, it is about abortion, and it is about so much more, because for all of the, you know, complaints by Members on the other side about abortion, about the debate over abortion in this country, which of course has people's dander up, this precedent—a universe in which Senator Cruz is comfortable with State legislatures cutting off the enforcement of constitutional rights that are still on the books—won't end with abortion. A world in which our constitutional rights are worth nothing more than the whims of 50 State legislatures is not a Federal system, it's not a system with the rule of law, and, frankly, it's not a system that is going to be sustainable in the long term. So——

Senator PADILLA. Thank you. Thank you, Mr. Chair.

Chair DURBIN. Thanks, Senator Padilla. I want to thank the witnesses. I'd like to make a few comments very quickly, because you've been very patient and waited through a lengthy hearing.

In response to Senator Hawley, Senator Blumenthal, who is the lead sponsor on the Women's Health Protection Act, confirmed that the bill explicitly says it would not supersede the law on partial-

birth abortions. Explicitly. The presentation by Senator Hawley should be taken—considered in that light.

Second, I'd like to say a word about Senator Cotton's question to you, Representative Howard, about safe, legal, and rare. I think what you said and what Senator Hirono said about how to reduce the number of abortions in this country—there are several ways to do it, I guess. One is to close down the abortion clinics, which seems to be the goal in Texas. The other is to empower and help women make the best decision in their lives by providing them counseling and a medical home, and health insurance, and the fundamentals—and family planning.

You know, I have struggled—I respect those who have a different point of view on the subject, but I have struggled with trying to understand this notion that eliminating or not providing family planning information is any hope of reducing the number of unwanted pregnancies. Practical human experience tells us that's not true. We can—I can focus—I'll use the word "rare"—on doing it in a positive way, rather than a negative way of shutting down the clinics.

As I reflect on this hearing, it is interesting to me how little was said about S.B. 8, how few really stood up and said, "Great idea. I wish I'd have thought of it." I think they basically understand that this is a flawed and dangerous process. What Justice Sotomayor said—"flagrantly unconstitutional." The word "facially unconstitutional" has been used, too.

Justice Kagan said, when dissenting from the Court's order in the S.B. 8 case, "The majority's decision is emblematic of too much of this Court's shadow docket decision-making, which every day becomes more unreasoned, inconsistent, and impossible to defend." I don't know that any of us said anything more extreme than that. She has really laid it on the line. Unreasoned, inconsistent, impossible to defend. To raise this question is not to intimidate the Court but to raise a fundamental question of Court procedure.

When I think of all the time I've spent and this Committee's spent with Supreme Court nominees, preparing to ask the questions, trying to envision what they might face on the Court and get—have some clarity as to their position, this now becomes an element. Are you going to let us know why you're making these decisions? Is it going to be a motions docket that is kept in the shadows? The way the Court is handling its shadow docket is opening the door for ideologically driven legal schemes to rewrite the law. It's a five-alarm fire for due process.

Americans mourn the loss of Justice Ginsburg, in part because she dedicated her life to equal justice, as well as judicial independence. Years before she passed, she wrote, "Judicial independence in the U.S. strengthens ordered liberty, domestic tranquility, the rule of law, and democratic ideas. It would be folly to squander this priceless constitutional gift to placate the clamors of benighted political partisans." Boy, she had a way with words. I believe we share an obligation to protect and preserve this priceless constitutional gift.

I'm going to ask unanimous consent—and since no one's here to object, I think I'm going to win—to enter a number of statements

into the record from a wide variety of groups supporting the Democratic position.

The hearing record will remain open for one week, for statements to be submitted.

Questions for the record may be submitted by Senators by 5 p.m. on Wednesday, October 6. Watch for emails.

I want to thank the witnesses again, and the hearing stands adjourned.

[Whereupon, at 12:25 p.m., the hearing was adjourned.]

[Additional material submitted for the record follows.]

Testimony of Fatima Goss Graves
President and CEO
National Women's Law Center

Senate Committee on the Judiciary
"Texas's Unconstitutional Abortion Ban and the Role of the Shadow Docket"
September 29, 2021

Thank you for the opportunity to provide testimony to the Senate Committee on the Judiciary on Texas's Unconstitutional Abortion Ban and the Role of the Shadow Docket. At the National Women's Law Center we fight for gender justice – in the courts, in public policy, and in our society – working across the issues that are central to the lives of women and girls, including child care and early learning, education, reproductive rights and health, income security, and workplace justice.

Access to reproductive health care, including abortion, is vital to gender justice. The ability to make the decision of whether to have an abortion, including the ability to access available and affordable abortion care, is a key part of a person's liberty and equality. Because of that basic truth, for nearly 50 years, the Supreme Court has squarely recognized that the U.S. Constitution protects the fundamental right to abortion.

And yet, despite the long-standing precedent, reaffirmed by the Supreme Court as recently as 2020, the fundamental right to abortion is at a perilous crossroads due to a decades-long effort by abortion opponents to attack *Roe* and abortion access in court, with legislation, and through the purposeful manipulation of our democratic system – including gerrymandering state districts and engaging in systemic voter oppression.

In the decades since *Roe v. Wade* was decided, abortion opponents have enacted more than a thousand abortion restrictions.[1] These laws create a web of interlocking, medically unnecessary barriers and targeted burdens that force abortion clinics to close and that delay, obstruct, and deny people access to constitutionally protected health care.

These efforts make the promise and protections of *Roe* a right in name only for millions of people across this country. For example, between 2011 and 2017, the South lost 50 abortion clinics and the Midwest lost 33 clinics, in part because of laws targeting abortion clinics.[2] Right now, nearly

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[1] ELYSSA SPITZER & NORA ELLMANN, CTR. FOR AM. PROGRESS, STATE ABORTION LEGISLATION IN 2021 3 (2021) (providing that as of August 2021, states have enacted 1,327 abortion restrictions since *Roe v. Wade* was decided), https://cdn.americanprogress.org/content/uploads/2021/09/20132731/AbortionLegislation-brief.pdf?_ga=2.96033436.1817694014.1632245924-554239022.1632245924.

[2] Elizabeth Nash & Joerg Dreweke, *The U.S. Abortion Rate Continues to Drop: Once Again, State Abortion Restrictions Are Not the Main Driver*, 22 GUTTMACHER POL'Y REV. 41, 42 (2019) (describing the disparate increase of abortion restrictions within specific regions of the U.S. compared to others), https://www.guttmacher.org/gpr/2019/09/us-abortion-rate-continues-drop-once-again-state-abortion-restrictions-are-not-main.

90% of U.S. counties do not have an abortion provider, and that is with *Roe v. Wade* still in place.[3] The resulting shortage of abortion providers has not ended the need for abortion care. Instead people who seek abortions now experience longer waiting times for appointments and increased travel to clinics, which often result in increased associated costs – such as long-distance travel, a hotel stay in a different city, additional child care costs, and more time off work.[4] These costs compound with other restrictions intended to make abortion unaffordable and, therefore, inaccessible, like laws prohibiting insurance coverage of abortion and forcing people seeking abortion to pay out of pocket for that care.[5]

For many years, anti-abortion state lawmakers justified these restrictions with false claims about protecting women's health. As president of an organization dedicated to gender justice, I can say with certainty that these laws do not improve women's health. Not only do abortion restrictions actually threaten individuals' health and well-being, but the same state lawmakers passing abortion restrictions have refused to enact policies that actually protect health care and promote equality.[6] For example, in the last decade Mississippi has passed multiple abortion restrictions, resulting in the closure of all but one clinic in the state. In the same period the state has refused to expand Medicaid despite having a maternal mortality rate of over 27 deaths for every 100,000 live births in 2019.[7] It also lacks anti-discrimination protections for pregnant students and has one of the largest gender wage gaps in the country.[8]

Anti-abortion efforts have intensified dramatically in the last three years, both in terms of the number of restrictions and in terms of how extreme they are. Abortion opponents were emboldened following the confirmation of Justice Kavanaugh to the Supreme Court, believing that the prospect of his appointment as Justice taking the place of Justice Kennedy, who had repeatedly voted to

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[3] Alice F. Cartwright et. al, *Identifying National Availability of Abortion Care and Distance From Major US Cities: Systematic Online* Search, 20 J. MED INTERNET RES. 1, 2 (2018), https://www.jmir.org/2018/5/e186/.

[4] *See* Br. of Amici Curiae National Women's Law Center and 47 Addition Organizations Committed to Equality and Economic Opportunity for Women in Supp. of Pet'rs at 14–15, *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) (No. 15-274) (describing the logistical and economic barriers to abortion access that people face as a result of abortion restrictions), https://nwlc.org/wp-content/uploads/2016/01/RRH_Whole-Womens-Health-Amicus-Brief_1.4.16.pdf.

[5] *See* GUTTMACHER INSTL., THE HYDE AMENDMENT: A DISCRIMINATORY BAN ON INSURANCE COVERAGE OF ABORTION (2021) (highlighting how "[m]any people living with low incomes experience delays obtaining abortion care because of time and effort spent to gather the necessary funds"), https://www.guttmacher.org/fact-sheet/hyde-amendment.

[6] *See* CTR. FOR REPRODUCTIVE RIGHTS & IBIS REPRODUCTIVE HEALTH, EVALUATING PRIORITIES: MEASURING WOMEN'S AND CHILDREN'S HEALTH AND WELL-BEING AGAINST ABORTION RESTRICTIONS IN THE STATES 15 (Vol. II, 2017), https://www.reproductiverights.org/sites/default/files/documents/USPA-Ibis-Evaluating-Priorities-v2.pdf.

[7] AM.'S HEALTH RANKINGS, MATERNAL MORTALITY IN MISSISSIPPI (2019), https://www.americashealthrankings.org/learn/reports/2019-health-of-women-and-children-report/state-summaries-mississippi.

[8] *See* Br. of Amici Curiae National Women's Law Center and 72 Additional Organizations Committed to Gender Equality in Support of Resp'ts at 33, *Dobbs v. Jackson Women's Health Org.*, 209 L. Ed. 2d 748 (May 17, 2021) (No. 19-1392), https://nwlc.org/resources/nwlc-files-amicus-brief-on-behalf-of-72-organizations-in-supreme-court-case-deciding-the-future-of-the-right-to-abortion/.

uphold *Roe v. Wade*, would mean the end of abortion in this country.[9] After the death of Justice Ginsburg and the confirmation of Justice Barrett, which gives the Court a solid majority of Justices with anti-abortion records, anti-abortion politicians went into overdrive. In 2021 alone, abortion opponents have introduced more than 560 abortion restrictions,[10] so far passing more than 90 restrictions designed to eliminate access to safe, legal abortion across the country, including Texas's SB 8.[11] At the same time, anti-abortion state lawmakers are passing increasingly extreme measures. Before 2019, only two states had passed bans on abortion after six weeks of pregnancy.[12] Today, 13 states have passed blatantly unconstitutional laws that either ban abortion after six weeks of pregnancy or simply ban abortion entirely.[13]

There can be no uncertainty about the aim of these extreme measures – to eliminate abortion altogether. In fact, in the last three years anti-abortion extremists mostly have abandoned the strategy of hiding behind false claims around protecting women and instead have been unabashed about their goals. As an Alabama lawmaker said in support of an anti-abortion bill in the state, "We probably have the most conservative court that we've had in generations, and this is the best opportunity for the court to take another look at Roe v. Wade."[14] Anti-abortion extremists want to send a case to the rapidly re-constituted Supreme Court that directly challenges *Roe v. Wade*, giving the Court an opportunity to either overrule it outright or gut it so significantly that available and affordable abortion access is eliminated. Their goal may be in reach. On December 1, the Supreme Court will hear oral arguments in *Dobbs v. Jackson Women's Health Organization*. In that case, the state of Mississippi has explicitly asked the Court to overturn *Roe* and *Planned Parenthood v. Casey*, in order to uphold the state's ban on abortion after 15 weeks of pregnancy. Significantly, overturning *Roe* and its progeny would have ripple effects well beyond abortion access. *Roe* and *Casey* are part of a long line of cases recognizing constitutional rights to liberty

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[9] *See e.g.* David A. Lieb & Steve LeBlanc, *Supreme Court could return abortion debate to the states*, AP NEWS, (July 12, 2018), https://apnews.com/article/donald-trump-wv-state-wire-mo-state-wire-brett-kavanaugh-supreme-courts-518f4ca098b4445b8db19d498fd376ca ("'The time is right. We need to act on it,' said Missouri Rep. Mike Moon, who is hoping Trumps' Supreme Court appointment breathes new life into an anti-abortion state constitutional amendment….").

[10] ELIZABETH NASH & LAUREN CROSS, GUTTMACHER INSTI., 2021 IS ON TRACK TO BECOME THE MOST DEVASTATING ANTIABORTION STATE LEGISLATIVE SESSION IN DECADES (2021), https://www.guttmacher.org/article/2021/04/2021-track-become-most-devastating-antiabortion-state-legislative-session-decades.

[11] ELIZABETH NASH & SOPHIA NAIDE, GUTTMACHER INSTI., STATE POLICY TRENDS AT MIDYEAR 2021: ALREADY THE WORST LEGISLATIVE YEAR EVER FOR U.S. ABORTION RIGHTS (2021), https://www.guttmacher.org/article/2021/07/state-policy-trends-midyear-2021-already-worst-legislative-year-ever-us-abortion.

[12] ELIZABETH NASH, GUTTMACHER INSTI., A SURGE IN BANS ON ABORTION AS EARLY AS SIX WEEKS, BEFORE MOST PEOPLE KNOW THEY ARE PREGNANT (2019) (identifying the first states to pass six-week abortion bans, including North Dakota in 2013 and Iowa in 2018), https://www.guttmacher.org/article/2019/03/surge-bans-abortion-early-six-weeks-most-people-know-they-are-pregnant.

[13] GUTTMACHER INSTI., STATE BANS ON ABORTION THROUGHOUT PREGNANCY (last visited Sept. 27, 2021)

[14] Chloe Atkins, *'A Crisis Moment': States, advocates brace for new fight over abortion rights*, NBC NEWS (Jan. 11, 2021), https://www.nbcnews.com/politics/politics-news/crisis-moment-states-advocates-brace-new-fight-over-abortion-rights-n1253665.

and personal decision-making including the rights to birth control, to marry, to parent, and to shape our own families.

As the *Jackson Women's Health Organization* case – and others like it[15] – proceed through the courts, abortion opponents devised yet another strategy to escalate the elimination of abortion access. Texas's SB 8 was specifically written to shut down abortion care and evade judicial review. Unlike other laws banning abortion at six weeks of pregnancy – all of which have been blocked by courts before going into effect for being blatantly unconstitutional[16] – this law's enforcement mechanism was designed to stymie providers and people in need of abortion care from seeking relief in the courts. When combined with the confirmation of judges with anti-abortion records, this strategy proved effective. In a shadow docket ruling in the middle of the night, five Supreme Court justices allowed Texas the ability to take away people's constitutional right and effectively shut down legal abortion in the state.

SB 8 is having its intended effect: as a result of the law, abortion providers in the state have stopped providing nearly all abortions after six weeks. Prior to the law, this amounted to between 85 and 95% of abortions provided in Texas.[17] Because SB 8 allows private citizens to enforce the law, it emboldens anti-abortion extremists and exacerbates a climate of anti-abortion violence, harassment, and intimidation. We must be clear about who bears the brunt of this law. It's Black and Latinx individuals who are disproportionately likely to live in poverty in Texas because of decades of racist policies. Texas patients in need of an abortion after six weeks now must drive an average of 230 miles *farther each direction* to access their closest clinic,[18] which will not be

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[15] There are nearly 20 current federal court cases involving abortion at or above the Circuit Court level. As the SB 8 case demonstrates, each of these is mere steps away from a potential Supreme Court decision either through a full merits briefing and decision or the shadow docket. *See* CTR. FOR REPRODUCTIVE RIGHTS, CASES ARCHIVE, https://reproductiverights.org/cases/, (last visited Sept. 27, 2021) (listing open CRR federal court cases related to abortion access); Kimberly Leonard, *A more conservative Supreme Court is primed to weaken or nix Roe v. Wade even with Joe Biden in the White House. Here are 16 abortion cases in the pipeline to the high court*, BUSINESS INSIDER (Feb. 2, 2021), https://www.businessinsider.com/rbg-abortion-rights-supreme-court-trump-roe-wade-nominee-2020-9, (listing abortion cases in the pipeline through February 1, 2021, date article was published).

[16] *See e.g. Memphis Ctr. for Reprod. Health v. Slatery*, No. 20-5969, 2021 WL 4127691, at *20 (6th Cir. Sept. 10, 2021) (affirming the district court's judgment enjoining implementation of Tennessee six-week abortion ban); *MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768, 776 (8th Cir. 2015) (granting permanent injunction of North Dakota HB 1456 ban on abortion at 6 weeks); *SisterSong Women of Color Reprod. Just. Collective v. Kemp*, 472 F. Supp. 3d 1297, 1328 (N.D. Ga. 2020) (blocking Iowa 6-week abortion ban, HB 481); *Planned Parenthood of the Heartland, Inc. v. Reynolds*, No. EQCE83074, 2019 WL 312072, at *5 (Iowa Dist. Jan. 22, 2019) (striking down 6-week abortion ban, Iowa Code § 146C.2); *EMW Women's Surgical Ctr., P.S.C. v. Beshear*, No. 3:19-CV-178-DJH, 2019 WL 1233575, at *2 (W.D. Ky. Mar. 15, 2019) (granting a temporary injunction of Kentucky six-week abortion ban, Senate Bill 9); *Planned Parenthood S. Atl. v. Wilson*, No. CV 3:21-00508-MGL, 2021 WL 1060123, at *12 (D.S.C. Mar. 19, 2021) (granting preliminary injunction of South Carolina six-week abortion ban, S.1); *Preterm-Cleveland v. Yost*, 394 F. Supp. 3d 796, 804 (S.D. Ohio 2019) (declaring Ohio SB 23 unconstitutional and blocking enforcement of the 6-week ban).

[17] U.S. Emergency Mot. for a TRO or Prelim. Inj. 7, Sept. 14, 2021 (citing to declarations of several Texas abortion providers), https://int.nyt.com/data/documenttools/justice-department-emergency-motion-for-a-restraining-order-to-stop-enforcement-of-texas-abortion-law/2390e9fb0dedfb2c/full.pdf.

[18] GUTTMACHER INSTITUTE, IMPACT OF TEXAS' ABORTION BAN: A 14-FOLD INCREASE IN DRIVING DISTANCE TO GET AN ABORTION (2021) (providing that "there were seven million women of reproductive age in Texas as of 2019.

possible for many pregnant people. The law threatens the financial security for people who need abortions – many people struggling to make ends meet simply cannot afford the additional expenses or time off work. It also provides special burdens for people who are already parents, as additional child care needs pile up alongside the increased travel. And those who live in rural areas like the Rio Grande Valley, particularly immigrants without documentation, will not be able to make the arduous trip.

For these individuals, there is no practical difference between the Supreme Court allowing SB 8 to go into effect and a decision overturning *Roe* – there is no meaningful constitutional right to abortion without access.

What is happening in Texas is the horrifying but inevitable outcome of decades of attacks by anti-abortion state lawmakers, and it was made possible by strategic manipulation of the shadow docket and a strong anti-abortion majority on the Court. When President Trump promised to "automatically" overturn *Roe* by appointing Justices to the Supreme Court, many dismissed the idea that such a thing could happen automatically.[19] I was certainly one of the people who put faith in the idea that fundamental rights are not so easily cast aside in a constitutional democracy. Instead, these words have turned out to be horrifyingly prescient. Using the shadow docket, the anti-abortion majority on the Court effectively overturned *Roe v. Wade* for 1 in 10 women of reproductive age in this country[20] in a one paragraph opinion and, as Justice Kagan noted, "without full briefing or arguments, and after less than 72 hours' thought."[21]

This is a constitutional crisis. Decades of precedent make clear that the people of this country have a fundamental right to abortion. Opponents must not be allowed to manipulate the law and, in the words of Justice Sotomayor, "the Court should not be so content to ignore its constitutional obligations."[22] As president of an organization that fights for gender justice, including abortion justice, I know that we cannot have gender justice as long as the right to abortion and ability to access abortion care can be gutted so carelessly. We will continue to fight to ensure everyone can access available and affordable abortion care. We need Congress to do the same, not only by

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and if most or all legal abortion care in the state were shut down, the average one-way driving distance to an abortion clinic would increase…to 247 miles"), https://www.guttmacher.org/article/2021/08/impact-texas-abortion-ban-14-fold-increase-driving-distance-get-abortion#.

[19] Aaron Blake, *Trump makes clear Roe v. Wade is on the chopping block*, THE WASHINGTON POST (July 2, 2018), https://www.washingtonpost.com/news/the-fix/wp/2018/07/02/trump-makes-clear-roe-v-wade-is-on-the-chopping-block/.

[20] GUTTMACHER INSTITUTE, IMPACT OF TEXAS' ABORTION BAN: A 14-FOLD INCREASE IN DRIVING DISTANCE TO GET AN ABORTION (Sept. 15, 2021), https://www.guttmacher.org/article/2021/08/impact-texas-abortion-ban-14-fold-increase-driving-distance-get-abortion# (providing that one in ten women cannot access abortion in the U.S. following enactment of Texas SB8).

[21] Justice Kagan further explains the cursory nature of the decision, stating that "[t]he majority has acted without any guidance from the Courts of Appeals… It has reviewed only the most cursory party submissions, and then only hastily. And it barely bothers to explain its conclusion…" *Whole Woman's Health v. Jackson*, No. 21A24, 2021 WL 3910722, at *5 (U.S. Sept. 1, 2021) (Kagan, J., dissenting).

[22] *Whole Woman's Health v. Jackson*, No. 21A24, 2021 WL 3910722, at *5 (U.S. Sept. 1, 2021) (Sotomayor, J., dissenting).

investigating this cynical manipulation of the shadow docket but by affirmatively protecting the right to abortion and passing laws that protect and expand abortion access, like the Women's Health Protection Act.

Thank you.

DONNA HOWARD
STATE REPRESENTATIVE
DISTRICT 48

Hearing before the Senate Committee on the Judiciary
Wednesday, September 29, 2021

Written Testimony of State Representative Donna Howard,
Chairwoman of the Texas Women's Health Caucus, on Texas' Decade Long
Attack on Women's Health and Family Planning Services

Dear Chairman Durbin, Ranking Member Grassley, and distinguished members of the Committee:

Thank you for the opportunity to testify today and share our story. I have been a member of the Texas House of Representatives since 2006 and represent House District 48 in Austin. In addition, I have had the honor to serve as the Chairwoman of the Texas House Women's Health Caucus (Caucus) since 2020. Formed in 2005, the TWHC is an official caucus of the Texas House of Representatives and works to promote and defend women's health. The Caucus is currently composed of 52 Texas House members who work to ensure that all Texans have access to affordable, quality women's health services.

During the 87th Regular Session, the Texas Legislature endured many challenges. When we first arrived in Austin, the top priority was to address the COVID-19 pandemic. However, within weeks of convening, our state was faced with the failure of our power grid during a historical winter storm, resulting in hundreds of deaths. Amidst these real and pressing issues, Republican leadership sought to divide the chamber in order to prioritize another unnecessary anti-abortion restriction. Senate Bill 8 (SB8), otherwise known as the "6-Week Ban," was passed in open defiance of the Constitution and upended decades of judicial and legislative precedent. In the weeks leading up to its final passage, I and my colleagues raised our concerns regarding the extreme nature of the bill. We tried to work with our Republican counterparts to fix these issues,

but we could not convince the majority to sway from party lines. At this point, our only recourse is through federal action or a Supreme Court decision.

The Road to Senate Bill 8

Over the last decade, the members of our Caucus have been at the forefront of an unending legislative fight to protect access to women's health and reproductive services, including abortion care. Republican lawmakers who have held the majority of legislative seats for decades have enacted sweeping policy reforms in every aspect of state government, particularly within women's healthcare.[1] In 2011, the state reduced funding for family planning services from $111 million dollars per year to $38 million dollars per year.[2] According to client-served data collected by the Department of State Health Services, in 2012, the fiscal year following this $73.6 million funding cut, clinics served 143,884 fewer Texans than they did in the previous fiscal year.[3] At the same time these funding cuts were going into effect, the Texas Health and Human Services Commission (HHSC) was in the process of renewing the state's 1115 Demonstration Waiver for its Women's Health Program (WHP). In the state's application, they included a provision which would ban any provider who chooses to "perform or promote elective abortions or that choose to be affiliates of entities that perform or promote elective abortions."[4] This change in policy, which came to be known as the "Affiliate Ban," would define women's health policy for years to come. The Ban allowed the state to block access to certain health care providers for reasons unrelated to the providers' ability to deliver quality women's health and family planning services.[5] The Centers for Medicaid and Medicare Services (CMS) ultimately denied Texas' request which prompted the

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[1] Ward, Mike. "Texas Tea Party: The Birth and Evolution of a Movement." *Houston Chronicle*, Houston Chronicle, 17 July 2017, https://www.houstonchronicle.com/news/houston-texas/houston/article/Texas-tea-party-the-birth-and-evolution-of-a-11292705.php.

[2] Potter, Joseph E, and Kari White. "The College of Liberal Arts the University of Texas at Austin." *UT College of Liberal Arts: TxPEP*, 27 Sept. 2021, https://liberalarts.utexas.edu/txpep/op-eds/washington-post.php.

[3] Potter, Joseph E. "The College of Liberal Arts the University of Texas at Austin." *UT College of Liberal Arts: TxPEP*, 27 Sept. 2021, https://liberalarts.utexas.edu/txpep/op-eds/statesman.php.

[4] *1115(a) Research and Demonstration Waiver, Texas Women's Health Program*. Texas Health and Human Services Commission, https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/tx/Womens-Health-Waiver/tx-womens-health-waiver-research-demo-waiver.pdf.

[5] Pogue, Stacey. *Excluding Planned Parent Has Been Terrible For Texas Women*. Center for Public Policy Priorities, Aug. 2017, https://everytexan.org/images/HW_2017_08_PlannedParenthoodExclusion.pdf.

state's exit from federal Family Planning programs and eventually led to the closure of more than 80 women's health and family planning clinics across the state.[6]

In 2013, in response to the federal government's decision, the state launched the Texas Women's Health Program (TWHP)- a fully state funded women's health program with the affiliate ban in place and without any additional federal dollars.[7] At the height of the program, TWHP served 176,577 Texans.[8] It operated for two years before the Sunset Advisory Commission recommended the state dissolve the program and combine it with other existing family planning programs. Overall, in the first three years of the implementation of the Affiliate Ban and a fully state-funded program, the number of clients served by TWHP declined by 14.7 percent. In addition, between 2012 and 2016, 15 percent of adult women in Texas reported that they did not see a doctor during the previous 12 months due to cost.[9] The 85th Legislature approved the consolidation of women's health programs and directed HHSC to use $50 million to create a women's health program with the purpose of increasing access to women's health and family planning services.[10] In July 2016, HHSC launched the final version of its women's health program--Healthy Texas Women (HTW). Within months of the program's launch, it was clear HTW was not prepared to meet the needs of Texans. The program's provider capacity was substantially lower than it was under the WHP and served 35,577 fewer clients than TWHP did in 2015.[11] In fact, HTW only recently reached the same level of clients that the WHP served in 2011. Over the years, HTW has struggled to meet the healthcare needs of Texas, and Texas leadership has refused to do anything to enact legislation to change these circumstances. Each year, instead of allocating state dollars to increase women's

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[6] Kari White, Kristine Hopkins, Abigail R. A. Aiken, Amanda Stevenson, Celia Hubert, Daniel Grossman, and Joseph E. Potter, 2015:
The Impact of Reproductive Health Legislation on Family Planning Clinic Services in Texas
American Journal of Public Health 105, 851_858, https://doi.org/10.2105/AJPH.2014.302515

[7] *Final Report of the Texas Women's Health Program: Fiscal Year 2015 Savings and Performance*. Texas Health and Human Services, Mar. 2017, https://www.hhs.texas.gov/sites/default/files/documents/laws-regulations/reports-presentations/2017/former-tx-womens-health-program-fy2015-savings-performance.pdf.

[8] *Final Report of the Texas Women's Health Program: Fiscal Year 2015 Savings and Performance*. Texas Health and Human Services, Mar. 2017, https://www.hhs.texas.gov/sites/default/files/documents/laws-regulations/reports-presentations/2017/former-tx-womens-health-program-fy2015-savings-performance.pdf.

[9] *Overview of Women's Health Program*. Legislative Budget Board Staff Report, Apr. 2019, https://www.lbb.state.tx.us/Documents/Publications/Staff_Report/2019/5098_WomensHealthPrograms.pdf.

[10] General Appropriations Act, HB 1, 2015

[11] Evans, Marissa. "Texas Works to Market Health Program Without Planned Parenthood." *The Texas Tribune*, The Texas Tribune, 5 May 2017, https://www.texastribune.org/2017/05/05/healthy-texas-women-program-billboards-are-not-enough/.

health funding to ensure more Texans have access to the care they need, Republican leadership has allocated millions of dollars to the Alternatives to Abortion Program (A2A). The A2A program is made up of crisis pregnancy centers who do not provide any healthcare services to pregnant people.[12] Instead, the program is best known for its misguided informational pamphlets and its ability to elude public accountability measures. Every year, women's health providers ask for an increase in funding and each time they are told there is simply not enough in the budget. The evidence is clear - the state's cut to women's health funding, in conjunction with the implementation of the Affiliate Ban, led to a reduction in women's health and family planning clinics which in turn led to a decline in the number of Texans receiving reproductive health services.

In order to fully understand that state of women's health services in Texas, it is also important to understand the onslaught of anti-abortion policy changes that were being enacted in tandem with the changes metioned above. In 2011, the same year as the funding cuts, the state passed House Bill 15, otherwise known as the "Sonogram Law," which requires a physician to perform a sonogram not more than 72 hours and not less than 24 hours before the abortion and before any sedative or anesthesia is administered.[13] The law is a coercive attempt to dissuade a pregnant person from choosing to have an abortion by requiring a doctor to display the sonogram, make the fetal cardiac activity audible, and give a verbal explanation of the result of the sonogram to the pregnant person. Two years later in 2013, the Republican leadership passed an omnibus abortion bill, House Bill 2 (HB2), which imposed several new and unnecessary restrictions on abortion care. Among other requirements, HB2 required doctors to have admitting privileges at a hospital within 30 miles of the abortion facility; restricted access to medication abortion by forcing physicians to follow a state-mandated protocol rather than current, evidence-based protocols; and required abortion facilities to meet the standards of ambulatory surgical centers regardless of the procedures offered at the clinic. In addition, HB2 banned abortions after 20 weeks post-fertilization unless a patient is at risk of death or the fetus has a severe fetal abnormality. Upon passage of HB2,

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[12] Astudillo, Carla, and Shannon Najmabadi. "An Anti-Abortion Program Will Receive $100 Million in the next Texas Budget, but There's Little Data on What's Being Done with the Money." *The Texas Tribune*, The Texas Tribune, 8 June 2021, https://www.texastribune.org/2021/06/08/texas-abortion-budget/.

[13] Miller, Sid. HB 15, 82nd Regular Session, *Texas Legislature Online - 82(R) Text for HB 15*, https://capitol.texas.gov/billlookup/Text.aspx?LegSess=82R&Bill=HB15.

reproductive rights groups challenged various provisions of HB 2 in *Whole Woman's Health v Hellerstedt*.[14] Eventually, the case made its way to the Supreme Court, where the admitting privileges and ambulatory surgical center requirements were deemed unconstitutional. Since 2015, Texas Republicans have passed an additional six pieces of legislation intended to stigmatize abortion care, pressure physicians into choosing to not perform the procedure, and, above all, erode a person's Constitutional right to access abortion, free from government interference. The restrictions include creating additional barriers for minors seeking abortion care and banning insurance companies from covering the procedure in their comprehensive health insurance plans, thus requiring people to purchase separate coverage for abortion care.[15] This year, the Texas Legisalture enacted further restrictions that will drastically reduce access to medication abortions - Senate Bill 4. SB 4, among other things, prohibits medication abortion beyond 49 days, or 7 weeks gestation, and requires unrealistic reporting requirements for physicians. SB4 also punishes the prescribing physician with a state jail felony if they violate the law. Finally, just a few weeks before SB8 went into effect, the 5th Circuit Court of Appeals became the first federal court in the U.S. to uphold a ban on the standard method of abortion after about 15 weeks of pregnancy (known as D&E).[16]

Each of these restrictions has only made accessing abortion care more difficult and dangerous to obtain, especially for the most vulnerable.[17] This is despite the fact that, according to data provided by HHSC, abortions continue to be among the safest procedures in Texas. Texas has only had one death arise from a complication due to abortion in the 13 years it has been collecting data.[18] In 2013, the Texas Legislature created the Maternal Mortality and Morbidity Review Committee (MMRC) within the Texas Department of State Health Services (DSHS) to study and provide recommendations regarding the high rate of maternal mortality amongst Texas mothers. Since then, the MMRC has provided the Legislature with a biennial report detailing the barriers facing

[14] "Whole Woman's Health v. Hellerstedt." *Oyez*, www.oyez.org/cases/2015/15-274. Accessed 26 Sep. 2021.
[15] "A Recent History of Restrictive Abortion Laws in Texas." *ACLU of Texas*, ACLU of Texas, 20 Sept. 2021, https://www.aclutx.org/en/recent-history-restrictive-abortion-laws-texas.
[16] 5th Circuit Court of Appeals. *Whole Women's Health v Paxton*. 18 Aug. 2021.
[17] Norwood, Candice. "Texas Law's Use of Surveillance Could Further Harm People of Color." *The 19th*, The 19th, 14 Sept. 2021, https://19thnews.org/2021/09/texas-abortion-law-people-of-color/.
[18] "ITOP Statistics." *Texas Health and Human Services*, https://www.hhs.texas.gov/about-hhs/records-statistics/data-statistics/itop-statistics.

pregnant people, the contributing factors to maternal mortality, and a list of policy recommendations intended to address their findings. Their most recent report indicated that in 2013 nearly 40% of the deaths they reviewed were pregnancy-related and 43 percent were pregnancy-associated but not related.[19] Of the pregnancy-related deaths, 31 percent were among Non-Hispanic Black women and 26 percent among Hispanic women. Whereas, that same year, only 11 percent of live births were among Non-Hispanic Black women and 48 percent were among Hispanic women. Unfortunately, this disparity is not new or surprising data in Texas because a common theme across reports and recommendations is the need to address health inequalities and disparities amongst communities of Black, Indigenous, and people of color (BIPOC) by increasing access to quality health education and services. While the Legislature has made some progress to address this critical issue, not nearly enough has been done to solve the problem and the situation has arguably been made worse by restricting access to quality women's health providers.

Senate Bill 8

In the years leading up to the passage of SB8, Texas Republicans have worked methodically to reduce access to reproductive health care throughout the state, including abortion care. We can confidently predict the number of unwanted pregnancies in the state will only increase causing a ripple effect throughout society and the state. And as we saw in the wake of HB2, there is a real fear that abortion clinics will close for good. As a result of the past anti-abortion pieces of legislation, the number of abortion clinics in the state has declined from 41 to 22 since 2011.[20] Within days of the bill's implementation, three of the four Planned Parenthood clinics in San Antonio, one of our state's largest cities, have decided to stop providing abortion care for the time being.[21] This is rapidly becoming the story across Texas as more and more providers choose to stop performing abortions all together because the penalties in SB8 are more severe than anything

[19] Maternal Mortality and Morbidity Review Committee, 2020, *Texas Maternal Mortality and Morbidity Review Committee and Department of State Health Services Joint Biennial Report*, https://www.dshs.texas.gov/legislative/2020-Reports/DSHS-MMMRC-2020.pdf. Accessed 29 Sept. 2021.

[20] Hurley, Lawrence. "Impact of Texas Clinic Law at Issue in Abortion Case before Supreme Court." *Reuters*, Thomson Reuters, 1 Mar. 2016, https://www.reuters.com/article/us-usa-court-abortion/impact-of-texas-clinic-law-at-issue-in-abortion-case-before-supreme-court-idUSKCN0W35H5.

[21] Bohra, Neelam. "Fearful of Being Sued under New Law, Three of Four San Antonio Abortion Facilities Stop Offering the Procedure." *The Texas Tribune*, The Texas Tribune, 7 Sept. 2021, https://www.texastribune.org/2021/09/07/texas-abortion-law-san-antonio/.

we have ever seen. The bill not only bans abortions after six weeks gestation, but it also empowers anti-abortion vigilantes to abuse our judicial system for their own personal gain. The private cause of action allows anyone, from anywhere, to come into our state and sue anyone who aids or abets, or intends to aid or abet, in the performance of an abortion after any embryonic cardiac activity is detected. If the plaintiff is successful, the law guarantees them a minimum of $10,000 in damages in addition to attorney's fees. At its core, the private cause of action is a deviant scheme to avoid judicial review and circumvent the system of governance our Founding Fathers created. In this way, SB8 is more than just another anti-abortion piece of legislation - it threatens the fabric of our nation by challenging our judicial system, our democracy, and our Constitution. After ten years of court battles, the anti-abortion movement has finally found a piece of legislation which avoids the normal avenues for government intervention. The 6-week Ban is unlike anything I have ever seen and must not be allowed to become the new normal in the United States.

SB8 has been the law of the land in Texas for less than a month, and it has already caused irreversible damage and harm in the lives of countless people. On August 31, Whole Women's Health in Fort Worth performed 67 abortion procedures in 17 hours.[22] From the moment they opened their doors at 7 am, their lobby was full of Texans hoping to exercise their right to have an abortion before SB8's deadline. Even before SB8 went into effect, every patient accessing abortion care was required to have an ultrasound, even if it was not medically necessary; be given medically-inaccurate misinformation about supposed "risks" associated with abortion; and wait 24 hours before they could have their procedure. Only after completing all of these steps, none of which convey any medical benefit, would the state of Texas allow them to have an abortion. But now, for those patients who are past the 6-week mark and arrive at the clinic for their first appointment, the outcome is very different. For some Texans, arriving even the day before the law went into effect was already too late. The 19th News shared the story of a Texan who arrived at the clinic on August 31 for her first appointment hoping she would be able to receive an abortion. The young woman, already a mother of three, was set to begin a five-year prison sentence later that week and did not want to give birth in jail. However, when she arrived at the clinic for the first appointment she was found to be 12 weeks pregnant. Despite being well within the

[22] Carrazana, Chabella. "67 Abortions in 17 Hours: Inside a Texas Clinic's Race to Beat New Six-Week Abortion Ban." *The 19th*, The 19th, 2 Sept. 2021, https://19thnews.org/2021/09/abortion-texas-whole-womans-clinic/.

Constitutional limit for abortion, the clinic had to turn her away because she would be too far along to get the procedure on September 1, which would have been the soonest she could have had the abortion due to the mandatory 24 hour waiting period. Upon hearing the news, the woman broke down in tears and begged the clinic to give her care. She was desperate and facing the possibility of carrying a child to term while incarcerated. Another clinic shared the story of a Texas woman who went to her first appointment on August 31 at which time there wasn't a heartbeat detected on the state mandated sonogram.[23] However, 24 hours later, on September 1, she arrived for her second appointment to actually have the procedure and her physician performed the second sonogram to verify there wasn't any cardiac motion, and to her horror there was an audible 'whoosh whoosh" sound coming from the machine. At only five weeks, she was too late to receive an abortion under the provisions of SB8. She was devastated. She already had a child at home and knew that bringing another child into their lives threatened her family's newfound financial security. In both of these situations, having an abortion was the right decision for the mother's life and her family's well being, but arbitrary and unnecessary government interference have denied them the ability to make that decision for themselves and their families.

If a person wants to terminate their pregnancy after the Texas deadline has passed, they must find other ways to do so. For nearly 80% of Texans seeking an abortion, accessing abortion out of state is the best option, even though it may take a drive of six to twelve hours each way to reach the closest clinics.[24] And neighboring states still have their own restrictions. Oklahoma, for example, has a required 72-hour waiting period between the first visit and the procedure. Even still, providers in Oklahoma and New Mexico have reported an exponential increase in the number of Texas patients receiving care at their clinics in just the four weeks that SB8 has been in effect. Trust Women Clinic in Oklahoma had 11 Texas patients in August; as of this week they have seen well over 100 since September 1.[25] Planned Parenthood Rocky Mountains in New Mexico has seen, and scheduled, more than triple the number of Texas patients they saw before the law went

[23] Tavernise, Sabrina. "With Abortion Largely Banned in Texas, an Oklahoma Clinic Is Inundated." *The New York Times*, The New York Times, 26 Sept. 2021, https://www.nytimes.com/2021/09/26/us/oklahoma-abortion.html.
[24] White, Kari, et al. "The College of Liberal Arts the University of Texas at Austin." *UT College of Liberal Arts: TxPEP*, July 2021, https://liberalarts.utexas.edu/txpep/research-briefs/senate-bill-8.php.
[25] Tavernise, Sabrina. "With Abortion Largely Banned in Texas, an Oklahoma Clinic Is Inundated." *The New York Times*, The New York Times, 26 Sept. 2021, https://www.nytimes.com/2021/09/26/us/oklahoma-abortion.html.

into effect.[26] For some Texans, traveling out of state is simply not an option. Between the costs of transportation, lodging, child care, and the risks to their jobs if they don't have paid family leave, Texans with low incomes are left without options.[27] Immigrants, people with disabilities, and young people struggle with multiple barriers that do not allow them to seek care out of state.

SB8 does not only negatively impact Texans seeking abortion care; this bill has reverberated throughout the medical community. During the 87th Regular Session, physician's groups such as the American College of Obstetricians and Gynecologists openly and adamantly opposed this bill. ACOG stated, "As ob/gyns, we take pride in the care we provide women in the most difficult of times and support the provision of unbiased counseling for informed consent for medical procedures. However, SB8 does not provide this. SB8 is an unnecessary intrusion in the physician-patient relationship and compromises compassionate conversations between doctors and patients."[28] This bill forces physicians to make an impossible decision - choose to do what is in the best interest of their patient or risk being sued for tens of thousands of dollars. In just a few short weeks, every legislative office, including my own, has heard the outrage of the medical community. By opening them up to civil and criminal penalties, Texas doctors feel as though the Legislature has abandoned them. Recently, Dr. Charles Brown, a local doctor and professor at the University of Texas Southwestern School of Medicine, recounted to me the issues he and other medical school professionals are facing in regard to this bill. He stated that SB8 has called into question their ability to teach medicine accurately and according to best practices. He said many are still unclear as to what they can do to advise students within the confines of the law when it comes to situations in which the life of the mother is not in imminent danger, but carrying the pregnancy to term is not their best option. He stated that many in this kind of situation are left without treatment options and feel as though they are "waiting for women to die."

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[26] Nottrnott@sfnewmexican.com, Robert, and Jim Weber/The New Mexican. "New Mexico Abortion Clinics See Influx from Texas." *Santa Fe New Mexican*, 19 Sept. 2021, https://www.santafenewmexican.com/news/local_news/new-mexico-abortion-clinics-see-influx-from-texas/article_68e114a6-14bc-11ec-9060-6bf8aaa0e8cc.html.

[27] Supreme Court of the United States. *Thomas E. Dobbs, State Health Officer of the Mississippi Department of Health v. Jackson Women's Health Organization*.

[28] Dunn, Tony. "Texas-ACOG Opposes HB 1515 by Representative Slawson and SB 8 by Senator Hughes." The American College of Obstetricians and Gynecologists. Accessed 27 Sept. 2021.

Conclusion

Texas has methodically and incrementally imposed more and more barriers to accessing abortions, culminating in the passage of SB8, a de facto ban on abortion, enforced by private citizens without standing. Texans are now being denied their constitutional right to abortion healthcare without judicial protection. The repercussions to women's health, freedom over one's own body and destiny, as well as to constitutional protections will have far-reaching impacts. We may not agree on the issue of abortion, but certainly we can agree the state should not be trying to enforce healthcare regulations by inviting out of state activists to use our court system to harass doctors and other healthcare providers in Texas. The Senate must protect abortion access and pass the Women's Health Protection Act. This right, as others, should not be subject to state boundaries but, rather, should be guaranteed for all Americans.

Testimony of Edmund G. LaCour Jr.*

Solicitor General of Alabama

Hearing before the United States Senate Committee on the Judiciary

"Texas's Unconstitutional Abortion Ban and the Role of the Shadow Docket"

September 29, 2021

Mr. Chairman, Ranking Member Grassley, and distinguished members of this Committee, thank you for inviting me to testify about the U.S. Supreme Court's emergency proceedings. I am honored to be here.

My name is Edmund LaCour, and I am the Solicitor General of Alabama. In that capacity, I litigate before federal and state courts on behalf of the State. Many of our cases involve time-sensitive matters and requests for emergency relief made either by the State or by our opponents. And many of these cases have gone before the Supreme Court. I thus have firsthand experience with the High Court's non-merits docket and, in particular, its emergency proceedings.

In my short time before you this morning, I would like to make three points. First, the term "shadow docket," while evocative, is inapt, concealing more than it reveals. Second, the Court's decisions in emergency proceedings—though often offering less guidance for non-parties than most merits opinions—typically serve the parties well given the difficulties inherent in emergencies. And third, the recent emergency-docket decisions from the Supreme Court that have garnered attention from the Committee are less remarkable than some have suggested. Most notably, the Court's recent decision in the Texas S.B. 8 litigation to deny the plaintiffs' request for an injunction was an entirely ordinary ruling. After all, one thing most everyone agrees on about S.B. 8 is that it raises unprecedented and difficult jurisdictional questions. It thus would have been extraordinary had the Court granted an injunction against the defendants in *Whole Woman's Health v. Jackson* when it was entirely unclear whether it even had authority to act.

* * *

Turning first to the term "shadow docket." As the Committee is aware, this phrase was coined by law professor Will Baude in a 2015 paper. Professor Baude used the term to refer to the Supreme Court's non-merits decisions. To be clear, the Court makes thousands of these decisions every single term; the non-merits cases Professor Baude focused on in his paper, however, were those that altered decisions below, and the majority of the paper focused on the Court's evolving summary-reversal jurisprudence. Current conversation

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* I am very grateful to Alabama Deputy Solicitor General Thomas Wilson for assisting me in preparing this testimony. Any errors are mine.

about the so-called "shadow docket" has further narrowed in scope to refer almost entirely to the Court's emergency proceedings.

But emergency proceedings hardly warrant such a nefarious moniker; they are a critical piece of any court's business. Congress recognized as much, so it provided federal courts with the ability to do something about the emergencies they would unavoidably face. In the late-eighteenth century, Congress authorized individual Justices or the entire Supreme Court to issue injunctions pending appeal. Congress has also provided emergency-relief powers to the federal courts of appeal and district courts. And state legislatures too have provided their courts with similar powers.

Far from lurking in the shadows, the Supreme Court's entire docket is freely searchable online, and the Court's emergency proceedings usually provide enough time for litigants in non-merits cases to respond and for *amici* to be heard. By contrast, many district courts simply rule on emergencies from the bench, without any transcript or online access, while offering only a one- or two-line decision. But most importantly, the Supreme Court, like all courts, sometimes faces drastic circumstances demanding relief on an expedited basis. When the Court faces an emergency concerning the fundamental rights of one (or thousands) of people and mere days (or hours) to act, it is often understandable that its decision is not accompanied by a lengthy opinion.

Which brings me to my second point: based on my experience litigating emergency proceedings before the Supreme Court, it is my view that the process generally works well for litigants in emergency situations. A pair of Alabama's recent cases illustrates the point. The first case, *People First of Alabama v. Merrill*, required the State to seek emergency relief when federal courts twice changed Alabama voting laws while absentee ballots were already being cast and we were just weeks away from elections—first the 2020 primary and then later the general election. Amidst the pandemic, the State broadly expanded absentee voting, but the safeguards that had previously applied to absentee voting continued to apply: a voter needed to submit a photo ID with her absentee ballot application, and she needed either two witnesses or a notary to witness her sign a voter affidavit. Weeks into absentee voting and shortly before the primary election, a federal district court preliminarily enjoined these measures and also ordered that curbside voting be allowed for the first time in State history. A few months later, the court entered a similar permanent injunction weeks before the general election. The Eleventh Circuit denied Alabama's application to stay the preliminary injunction and, when the permanent injunction issued, partially denied Alabama's request for a stay. But both times, the Supreme Court ultimately vindicated Alabama and reinstated the State's election requirements.

The briefing that followed each district-court decision moved quickly, working through the Eleventh Circuit and receiving a decision from the Supreme Court in less than a month. The Court's orders were perfunctory, which, as critics have noted, is not uncommon for non-merits decisions. But while more analysis would have been welcome, and perhaps helpful for other States facing similar challenges, it was unnecessary to resolve the State's

emergency. The Supreme Court's decisions in *People First* followed from the Court's 2006 decision, *Purcell v. Gonzalez*, which advised that courts should exercise caution before changing voting rules on the eve of an election, lest the court create confusion among voters and do more harm than good. Considering that the district court had altered Alabama's voting laws after voting had already begun, potential for confusion was clear, and the Court's emergency proceedings operated as they should have.

Another case the State litigated earlier this year further illustrates the emergency docket's role. In *Dunn v. Smith*, a death-row inmate, Willie Smith, asserted that the State's execution safety protocol violated his religious liberty rights under the Religious Land Use and Institutionalized Persons Act because the protocol did not allow for his pastor to accompany him into the execution chamber during Smith's execution. Alabama and the district court disagreed with Smith. But twenty-four hours before his scheduled execution, a divided Eleventh Circuit panel granted Smith an injunction. The State filed an emergency application with the Supreme Court, seeking to stay the Eleventh Circuit's decision.

We were able to brief our arguments and submit to the Court the crucial information it needed to issue a thoughtful ruling given the emergency posture of the case. While I think we presented a strong case, a majority of the Justices rejected it. But I hardly view that as an indictment of emergency proceedings themselves. And while a lengthy majority opinion would have been helpful to Alabama and other States trying to satisfy RLUIPA's requirements in the execution context, we could hardly have expected such a writing in less than a day. In any event, the stay made clear that the State would either need to alter its execution protocol or delay Smith's execution while pressing on through the normal appellate process. And a thoughtful opinion from Justice Kagan that issued with the Court's order improved the State's understanding of the burdens it would likely need to satisfy going forward. Many of the Supreme Court's emergency-docket decisions fit this mold.

Finally, a few words about the emergency-docket rulings that spurred this hearing. The hearing announcement highlighted three recent decisions that purportedly constituted "abuse" of the Supreme Court's emergency docket. First, the Court's decision not to stay a district-court order rejecting the Biden Administration's decision to repeal President Trump's Migrant Protection Protocols, or "MPP"; second, the Court's decision to vacate a stay of the CDC's second COVID-19 eviction moratorium after a district court had held that moratorium (and its predecessor) to be unlawful; and third, the Supreme Court's decision not to stay Texas's recently enacted S.B. 8. None of these decisions was extraordinary, and each could have been predicted based on recent precedent.

First, the Court's decision not to stay a lower court's enjoinment of the Biden Administration's MPP repeal was consistent with very recent Supreme Court precedent. When the Trump Administration tried to repeal DACA, the Supreme Court, in *DHS v. Regents*, ultimately determined that the Administration's action was arbitrary and capricious based in part on a failure to adequately consider important reliance interests implicated by the repeal. When the Biden Administration tried to repeal MPP, the district court repeatedly cited *Regents* and ultimately concluded that the Administration's decision

to rescind its predecessor's policy suffered flaws similar to those that doomed the Trump Administration's attempt to repeal DACA. The Supreme Court's decision not to stay a lower court order applying recent Supreme Court precedent was unsurprising.

And the Court's most recent eviction-moratorium decision was even less surprising. A district court had previously held the first moratorium unlawful, but had stayed its order pending appeal. When property owners asked the Supreme Court to vacate that stay, the Court by a 5-4 vote declined. Justice Kavanaugh concurred on the ground that the moratorium would soon expire, but cautioned that the moratorium "exceeded [the CDC's] existing statutory authority" and should not be renewed absent congressional approval. Congress, in turn, declined this invitation to legislate. That left President Biden to decide whether to order a new moratorium that he himself admitted would likely be deemed unlawful. When he pushed forward, the district court that had held the initial moratorium unlawful reached the same conclusion about its replacement. The district court stayed its judgment, but when the Supreme Court confronted the question whether the new moratorium should remain in effect during a new round of appeals, the Court did just what Justice Kavanaugh had explained it would, vacating the district court's stay so that the district court's judgment against the moratorium would take effect. The decision surprised no one.

Now for S.B. 8. As every legal commentator has observed, this law is novel in its design and application. Chief Justice Roberts, joined by Justices Breyer and Kagan, stated that the law was "not only unusual, but unprecedented." And its unusual design creates serious questions about how a federal court may obtain jurisdiction to review and potentially enjoin it. This thorny issue of what it means for a federal court to exercise its constitutional authority was sparsely briefed at the time *Whole Woman's Health v. Jackson* reached the Supreme Court. Indeed, as Justice Kagan explained, the Court received virtually no "guidance from the Court of Appeals," and "reviewed only the most cursory party submissions, and then only hastily."

Everyone agrees that the law presents a jurisdictional question the Supreme Court has never addressed. Based on the thin record Justice Kagan described, overturning the law would have constituted an extraordinary use—and likely an unprecedented expansion—of judicial power. The Court was faced with the decision to either exercise jurisdiction where it may not have had any or allow the fate of the state law to work its way through other state or federal proceedings where a court's authority to act would likely be far clearer. The Supreme Court's decision to take the latter path was consistent with its emergency-docket jurisprudence and with the way we generally expect federal courts to act.

* * *

In closing, the emergency docket provides an important release valve for litigants when the Court determines that relief is clearly warranted in drastic circumstances. And recent emergency-docket decisions that sparked this hearing are largely consistent with Court

precedent and have been largely predictable. There is little shadowy about the Supreme Court's emergency docket.

Thank you again for the opportunity to offer testimony on this important and often misunderstood subject. I hope that what I have offered is useful, and I am happy to answer any questions members of the Committee may have for me.

"Jurisdiction and the Supreme Court's Orders Docket"

U.S. Senate Committee on the Judiciary

September 29, 2021

Testimony of Jennifer L. Mascott
Assistant Professor of Law & Co-Executive Director of the C. Boyden Gray Center for the Study of the Administrative State, George Mason University's Antonin Scalia Law School

Dear Chairman Durbin, Ranking Member Grassley, and Members of the Subcommittee,

Thank you for the invitation to appear today to testify regarding Supreme Court jurisdiction and resolution of matters on the Court's orders docket. I teach and write in the areas of constitutional law and interpretation, administrative law, federal courts, and the separation of powers. Previously I served as a Deputy Assistant Attorney General in the Office of Legal Counsel and as an Associate Deputy Attorney General within the U.S. Department of Justice.

My testimony will address the procedural and jurisdictional challenges related to the Supreme Court's recent consideration of an emergency motion regarding the Texas heartbeat legislation and trends related to Supreme Court resolution of applications for orders on its non-merits docket. Due to the Committee's expressed interest in discussion of the Court's role in review of the Texas Heartbeat Act, my testimony will focus on the Court's decision not to grant an affirmative injunction pending appeal, thus preserving the pre-litigation status quo under state law.

The Supreme Court's September 1, 2021, decision not to issue an emergency order enjoining application of the Texas Heartbeat Act was consistent with longstanding federal jurisdictional doctrines related to threshold questions of standing, state sovereign immunity, and the scope of relief available in the challenge brought before the Court. In light of these numerous complex and thorny issues, and the lack of a present concrete dispute involving the defendants in the litigation, it would have been extraordinary for the Court to grant an order on the merits of the challenged state legislation.[1] The Court's decision not to intervene maintained the pre-litigation status quo and the stays of district court litigation pending appeal issued by both of the lower courts to rule in the case.[2]

Some court observers and scholars have expressed concern with the recent pace of the Supreme Court's issuance of orders, outside the typical merits briefing process, that stay or vacate lower court orders granting relief from challenged laws or policies. But, critically, such

[1] *See, e.g.*, *California v. Texas*, 593 U.S. ___, ___ (2021) (Breyer, J.) (slip op., at 8); *Ex parte Young*, 209 U.S. 123, 163 (1908).

[2] The district court stay applied only to the state defendants and not to the private citizen defendant. *See* Order, *Whole Woman's Health v. Jackson*, slip op. at 2 (W.D. Tex. Aug. 27, 2021); Order, *Whole Woman's Health v. Jackson*, slip op. at 2 (5th Cir. Aug. 27, 2021) (per curiam) ("Fifth Circuit Order"). The Fifth Circuit subsequently issued a temporary administrative stay of the district court proceedings. See Fifth Circuit Order at 2.

an order was *not* issued here—indeed, it was the abortion providers who asked the Supreme Court to grant extraordinary relief. The Court declined to do so. Unlike in past cases where the federal government sought relief from lower court orders invalidating its policies, there were serious jurisdictional questions here whether abortion providers could obtain effective injunctive relief from the Texas law's private civil remedy merely by suing one private party, one state court clerk, and one state court judge who allegedly might bring and adjudicate future suits under the Texas law (in addition to the several state defendants who lack any role in enforcing the Texas statute). More generally, the arguably increased rate of Supreme Court orders on the emergency docket is due in large part to actions taken outside the control of the Court but impacting its docket, such as the increase in federal district court nationwide injunctions and state executive actions during the pandemic health emergency to address the crisis outside the ordinary legislative policymaking process.[3]

On May 19, 2021, the Texas state legislature and governor enacted the Texas Heartbeat Act. Close to two months later, on July 13, petitioners filed a complaint challenging the constitutionality of the measure under the Fourteenth Amendment. More than three weeks after that, petitioners filed a motion on August 7 for an emergency injunction to halt operation of the law. This motion thus came within several weeks of the effective date of the legislation on September 1. The heartbeat legislation restricts abortion once a fetal heartbeat is discovered, subject to an exception for the life of the mother, but prohibits state government officials from enforcing its provisions. Instead the state statute authorizes private citizens to bring civil actions against individuals such as practitioners and health insurers who either violate the post-heartbeat prohibition or take action facilitating prohibited abortions. Civil liability attaches for violations of the bill by individuals who perform or induce abortion or "aid or abet[]" those actions. Women seeking abortions are not subject to potential penalties or prosecution under the bill.

At the time of the filing of the litigation, the Texas bill had not yet become operational. Plaintiffs (and subsequent petitioners in the Supreme Court) brought their complaint against one state court judge, a county judicial clerk, a private activist, and various state executive officials such as the Texas Attorney General. None of these defendant state officials have authority under the terms of the state legislation to bring an action to enforce it. And the private defendant indicated by affidavit that he had no intention of bringing civil action to enforce the state law. As for the judicial officers, the county clerk's sole role is to docket any action brought for adjudication without regard to the underlying merits, and the state court judge's sole role is to neutrally adjudicate any such action.

Within the three-branch federal constitutional structure, Article III of the Constitution authorizes creation of a federal judiciary to resolve cases and controversies against particular parties.[4] The drafters and ratifiers of the Constitution rejected proposals for creation of a

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[3] *See, e.g., Dep't of Homeland Security v. New York*, 589 U.S. ___ (2020); *Tandon v. Newsom*, 593 U.S. ___ (2021).

[4] U.S. CONST. art. III, section 2, clause 1 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . . [and] to Controversies . . . .").

general council of revision to review constitutional and legal questions in the abstract.[5] Consequently the Court has repeatedly reaffirmed, over the course of hundreds of years, its lack of jurisdiction to issue advisory opinions generally reviewing legislation or providing legal guidance outside the context of resolution of concrete disputes involving specific parties.[6]

In *Whole Woman's Health v. Jackson*, petitioners requested relief against state officials with no responsibilities or authority under the Texas heartbeat law to bring the private actions forming the core enforcement mechanism of the statute. Therefore, it is unclear how any judicial decision issuing an order or injunction against those officials in this litigation would have interrupted the general operation of the Texas law or addressed the harm alleged by petitioners. That is especially so given that no decision had yet been issued to certify a defendant class, such that any order issued by the Supreme Court would not have applied to the overwhelming majority of state court judges and clerks and potential private plaintiffs. In addition, there was no official concrete action applying the law for a court to address or halt.[7] The one private defendant indicated no intention to take action under the Texas law, meaning there was no ripe controversy for federal courts to resolve regarding this defendant under longstanding principles of federal jurisdiction.[8] This litigation would have been a poor vehicle for any in-depth evaluation of the merits of petitioners' constitutional claims.

The Constitution provides for limited federal jurisdiction because of the structural principles that form its foundation such as the three-branch separation of powers at the federal level and the federal-state structure providing for a limited federal government overlaying continued vibrant state government.[9] In the U.S. representative republic structure,[10] federal and state legislatures bear general responsibility for policymaking to help ensure that laws regulating citizens will represent the interests of the electorate. The federal judiciary has the relatively more modest role of stepping in when laws are applied in a way that creates a concrete dispute impacting a particular party who then initiates a case or controversy challenging the law. The normal way this process operates in circumstances where a state-law private civil remedy allegedly violates federal constitutional rights is for a defendant in state court to seek appellate relief from the adverse judgment in the U.S. Supreme Court.[11] What is outside the normal course is for a state-law defendant to evade that

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[5] *Cf.* Max Farrand, ed., *The Records of the Federal Convention of 1787*, vol. 1, at 20-21 (describing an early proposal to grant a national legislature veto authority over state legislation and to establish a council with veto authority over national laws).

[6] *See, e.g.*, *California v. Texas*, slip op. at 8; *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *Muskrat v. United States*, 219 U.S. 346 (1911).

[7] *Cf., e.g.*, *Murphy v. National Collegiate Athletic Assn.*, 584 U.S. ___, ___ (2018) (Thomas, J., concurring) (observing that remedies typically "operate with respect to specific parties" and not on "legal rules in the abstract"), cited in *California v. Texas*, slip op. at 8.

[8] *See, e.g.*, *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 579-81 (1985).

[9] *See, e.g.*, U.S. CONST. amend. X; *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991).

[10] *Cf.* U.S. CONST. art. IV, section 4.

[11] *See* 28 U.S.C. § 1257; *see, e.g.*, *New York Times v. Sullivan*, 376 U.S. 254 (1964) (resolving a First Amendment challenge related to defamation rules created by Alabama courts).

tried-and-true path for judicial review by instead filing a pre-enforcement suit in federal court against state executive officials with no enforcement role, state judicial officers charged with neutrally processing and adjudicating any claims and defenses, and a private party who had disavowed any intent to bring a state-court suit. Unsurprisingly, therefore, the complaint and filings in *Whole Woman's Health v. Jackson* alleged no concrete application of the Texas heartbeat law by any of the parties named as defendants.[12] Nor could the filings have made such a claim against the state government defendants in the case, as those defendants lack an enforcement role under the terms of the state law providing for enforcement through private causes of action.[13]

In addition to the federal jurisdictional limitation of resolution of concrete cases and controversies, the federal-state constitutional structure rests on the longstanding principle of state sovereign immunity. State sovereign immunity, like immunity for elected officials at the federal level, is a longstanding principle foundational to, and inherent in, the federal constitutional structure.[14]

The Supreme Court has repeatedly recognized and reaffirmed the scope of state sovereign immunity subject to certain limited exceptions. For example, in *Ex parte Young*, the Supreme Court acknowledged that state sovereign immunity encompasses both suits against a state as a party and suits against state officials taking official action such that the state is essentially the party subject to challenge.[15] Because none of the state officers named in *Ex parte Young* "held any special relation to the particular statute alleged to be unconstitutional," the Court dismissed the suit for lack of jurisdiction.[16] The Court noted that none of the state officer parties had been expressly directed to enforce the law and, thus, an action against them could not serve as a vehicle to bring a general challenge to the constitutionality of the relevant state law.[17] The Court emphasized that "[a]s no state officer who was made a party bore any close official connection with the [challenged] act, . . . the making of such officer a party defendant was a simple effort to test the constitutionality of [the] act" and "there is *no principle* upon which [that] could be done."[18]

If the rule were to the contrary and a suit could be brought against state officials simply "because they were law officers of the state, a case could be made for the purpose of testing the constitutionality of the statute."[19] That would be a "very convenient way" to "obtain[] a speedy judicial determination of questions of constitutional law," the Court noted.[20] But,

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[12] *See generally* Emergency Application for Writ of Injunction and in the Alternative, to Vacate Stays, *Whole Woman's Health v. Jackson*, No. 21A24 (Sup. Ct. 2021).

[13] *Cf. Whole Woman's Health v. Jackson*, slip op. at 2 (Sup. Ct. Sept. 1, 2021) ("Supreme Court Op.") (noting that "[]he State has represented that neither it nor its executive employees possess the authority to enforce the Texas law either directly or indirectly").

[14] *Cf.* U.S. CONST. art. I, section 6, clause 1 (Speech or Debate Clause).

[15] *See, e.g.*, *Ex parte Young*, 209 U.S. 123, 150 (1908).

[16] *See id.* at 157, 168.

[17] *See id.* at 156-57.

[18] *Id.* at 156 (emphasis added).

[19] *Id.* at 157.

[20] *Id.*

according to the Court, "it is a mode which cannot be applied to the states of the Union consistently with the fundamental principle that they cannot, without their assent, be brought into any court at the suit of private persons."[21]

Consistent with those passages from the more-than-100-year-long precedent of *Ex parte Young*, the Court has repeatedly reaffirmed the structural constitutional principles underlying state sovereign immunity and the limits of federal judicial review of certain official state action.[22] State sovereign immunity "inheres in the system of federalism" and applies to immunity even from claims arising under federal law.[23] The "sovereign immunity of the States" is "a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today" unless expressly or structurally altered by Constitution.[24]

In light of those background principles of the contours of Article III jurisdiction and the longstanding provenance of sovereign immunity, the Supreme Court noted "complex and novel antecedent procedural questions" in *Whole Woman's Health v. Jackson*, making issuance of the requested preliminary relief inappropriate at that time and ineffectual.[25] The Court acknowledged that applicants had "raised serious questions regarding the constitutionality of the Texas law at issue."[26] But the Court indicated that its review of questions on the merits of the state law would not be appropriate in the current posture, in part because the Court found it "unclear whether the named defendants in [the] lawsuit can or will seek to enforce the Texas law against the applicants in a manner that might permit [Court] intervention."[27] This determination was consistent with the Court's lack of power to generally review in an advisory fashion or enjoin "laws themselves"—in contrast to the Court's "power to enjoin individuals tasked with enforcing laws."[28]

In addition to the specific questions related to Supreme Court jurisdiction in *Whole Woman's Health v. Jackson*, the Committee has indicated interest in testimony today related to the Court's general consideration of matters on its orders list. The orders docket of the Court includes matters such as routine denials of petitions for certiorari as well as matters brought before the Court in an emergency posture.[29] Maintenance of an orders docket is typical for a judicial body and is a longstanding practice of the Court.

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[21] *Id.*

[22] *See, e.g.*, *Alden v. Maine*, 527 U.S. 706, 730-35 (1999).

[23] *Id.* at 731-32.

[24] *See id.* at 713. *See also Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 69 (1996) (noting that sovereign immunity is rooted in "fundamental jurisprudence in all civilized nations" (internal quotation omitted)). *See also* Federalist No. 81 (Hamilton) ("It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent" consistent with "the general practice of mankind").

[25] Supreme Court Op. at 1.

[26] *Id.*

[27] *Id.*

[28] *Id.*; *see also* Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. 933 (2018).

[29] *See generally* Hashim M. Mooppan, Testimony to the Presidential Commission on the Supreme Court of the United States (September 2021), *available at* https://www.whitehouse.gov/wp-content/uploads/2021/09/Hashim-Mooppan.pdf (addressing litigation concerning stays and injunctions of executions). And Supreme Court practitioner Tom Goldstein who co-founded SCOTUSblog recently observed

Recently the Supreme Court's orders docket in particular has received more attention in part because of legal scholarship analyzing the docket and applying to it a pithy moniker.[30] But as noted this past winter during expert testimony on the Supreme Court's orders list before the U.S. House Subcommittee on the Courts, Intellectual Property, and the Internet, the Court makes public every brief and order on the docket.[31] And the most common category of Supreme Court order issued in summary fashion is Supreme Court denials of certiorari, a function of the Supreme Court's generally discretionary jurisdiction.[32] Some scholars have expressed concern that the Court is using the orders docket with increased frequency to reverse lower court stays and permit challenged government policies to become effective.[33] But requests for the Court to step into such questions often arise from the decisions of lower federal courts to unilaterally issue decisions with broad, immediate effect, causing litigants to seek Supreme Court relief to permit the enacted laws or regulations to remain operational during more in-depth judicial review of their legality.[34] And again, it warrants emphasis that the Court's action in *Whole Woman's Health v. Jackson* was procedurally different from these cases, because it was the abortion providers who were asking the Court to grant relief denied by lower courts and thereby disturb the pre-litigation status quo. The Court declined to do so.

Commensurate with the increased attention to the Court's orders docket, lower federal courts have increasingly relied on the issuance of national injunctions to immediately halt the application of laws and regulations put in place by elected and appointed policy officials.[35] Federal courts scholars and more than one Justice on the Court have questioned whether federal courts legitimately have "Article III jurisdiction to grant nationwide defendant-oriented injunctions."[36] As the Committee considers issues related to the Supreme Court's issuance of orders on the emergency docket, trends related to the issuance of far-ranging relief in the lower courts also warrant consideration.

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that the Court's orders docket is growing as lower courts issue an increasing number of decisions directly inconsistent with binding precedent and current law. Remarks, Thomas C. Goldstein, *Supreme Court Preview: What is in Store for October Term 2021?* (Sept. 2021), recording available at https://www.youtube.com/watch?v=VDgMJr32UjQ&t=17.

[30] William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J. of Law & Liberty 1 (2015).

[31] Testimony of Professor Michael T. Morley, *The Supreme Court's Shadow Docket*, U.S. House subcommittee hearing on Feb. 18, 2021, at p. 1, available at https://docs.house.gov/meetings/JU/JU03/20210218/111204/HHRG-117-JU03-Wstate-MorleyM-20210218-U1.pdf.

[32] *See id.* at 2.

[33] *See generally, e.g.*, Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123 (2019).

[34] *See, e.g., id.* at 134; Morley, *supra* note 31, at 4.

[35] *See generally* Samuel Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417 (2017); Michael T. Morley, *Disaggregating Nationwide Injunctions*, 71 Ala. L. Rev. 1 (2019).

[36] *See* Morley, *supra* note 31, at 5; *see also Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring); *Trump v. Hawaii*, 138 S. Ct. 2392, 2429 (2018) (Thomas, J., concurring).

TEXAS'S UNCONSTITUTIONAL ABORTION BAN AND THE ROLE OF THE SHADOW DOCKET

Hearing Before the Senate Committee on the Judiciary
Wednesday, September 29, 2021

Testimony of Stephen I. Vladeck
Charles Alan Wright Chair in Federal Courts
University of Texas School of Law

Chairman Durbin, Ranking Member Grassley, and distinguished members of the Committee:

Thank you for the invitation to testify today. As you know, I hold the Charles Alan Wright Chair in Federal Courts at the University of Texas School of Law, where my research and writing focus on the intersection of constitutional law, national security law, and the federal courts. In addition to writing and teaching about the Supreme Court, I also practice before it (I've argued three cases over the last four Terms), and help CNN cover it (as its Supreme Court analyst). It's therefore not only my distinct honor, but also a real treat, to have the opportunity to participate in today's hearing.

The Supreme Court's 5-4 ruling in the SB8 case just before midnight on Wednesday, September 1 helped to bring an enormous amount of public attention not only to Texas's controversial (and, in my view, clearly unconstitutional) anti-abortion law, but to the rise of what has come to be known as the Supreme Court's "shadow docket." In many respects, the one-paragraph decision in *Whole Woman's Health* v. *Jackson*[1] reflected the inevitable collision of a series of subtle but significant shifts in how the Justices have handled emergency applications with a deliberate attempt by the Texas legislature to frustrate meaningful judicial review of its ban on virtually all abortions after the sixth week of pregnancy.

My goal in my testimony today is to help put both of these developments into context — and to explain in detail why I believe that Justice Kagan was exactly right in her dissent in *Jackson*, in which she concluded that "the majority's decision is emblematic of too much of this Court's shadow-docket decisionmaking — which every day becomes more unreasoned, inconsistent, and impossible to defend."[2]

To that end, my testimony has six distinct objectives: (1) to introduce the shadow docket and describe what it comprises; (2) to document the rise in several specific *types* of significant shadow docket rulings in the last few years; (3) to identify some of the possible explanations for this uptick; (4) to outline at least some of the serious concerns that these developments raise; (5) to situate SB8 — and the litigation challenging it — within the broader conversation about the shadow docket; and (6) to sketch out some potential reforms that both the Court and Congress ought to consider in response both to SB8 specifically and to the rise of the shadow docket, more generally.

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1. *Whole Woman's Health* v. *Jackson*, No. 21A24, 2021 WL 3910722 (U.S. Sept. 1, 2021) (mem.).

2. *Id.* at *5 (Kagan, J., dissenting).

I. WHAT *IS* THE "SHADOW DOCKET"?[3]

The term "shadow docket" was coined by University of Chicago law professor Will Baude in 2015 as a catch-all for a body of the Supreme Court's work that was, to that point, receiving virtually no academic or public attention.[4] Unlike the Court's "merits" docket, which includes the approximately 60–70 cases each Term in which the Justices hear oral argument and resolve the dispute in a signed "opinion of the Court," the "shadow" docket, as Professor Baude described it, comprises the thousands of *other* decisions the Justices hand down each Term — almost always as "orders" from either a single Justice (in their capacity as "Circuit Justice" for a particular U.S. Court of Appeals) or the entire Court. So understood, although the term itself dates only to 2015, the shadow docket has been around for as long as the Supreme Court. Indeed, from 1802 to 1839, the Court even had a "rump" docket, which allowed a single Justice to handle much of the procedural minutiae.[5]

Although it's only of recent vintage, the "shadow" metaphor is, in my view, entirely appropriate given the contrast between such orders and merits decisions. The latter receive at least two full rounds of briefing; are argued in public at a date and time fixed months in advance; and are resolved through lengthy written opinions handed down as part of a carefully orchestrated tradition beginning at 10:00 a.m. Eastern time on pre-announced "decision days." It is impossible to miss these 60–70 cases, which, on top of the attention they receive from the Court, also tend to be the subject of numerous professional and academic Term "preview" events (before they're argued) and "recap" events (after they're decided). Indeed, both academic and popular efforts to identify broader trends in the Court's work tend to focus almost exclusively — and, in my view, to their significant detriment — on this understandably prominent but numerically small slice of the Court's caseload.

In contrast, rulings on the "shadow docket" typically come after no more than one round of briefing (and sometimes less); are usually accompanied by no reasoning (let alone a majority opinion); invariably provide no identification of how (or how many of) the Justices voted; and can be handed down at all times of day — or, as has increasingly become the norm, in the middle of the night. Owing to their unpredictable timing, their lack of transparency, and their usual

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3. Much of this discussion is adapted from my June 30, 2021 testimony before the Presidential Commission on the Supreme Court of the United States.

4. *See* William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1, 3–5 (2015).

5. *See* Ross E. Davies, *The Other Supreme Court*, J. SUP. CT. HIST., Nov. 2006, at 221.

inscrutability, these rulings come both literally and figuratively in the shadows.[6]

That does not mean that the shadow docket is inherently pernicious. Every court needs a docket to handle applications and other emergency requests that come up outside the normal flow of merits litigation. The Supreme Court is no exception. Indeed, scholars and court-watchers have long *known* about the Court's shadow docket; they've just largely ignored it — because most of the Justices' decisions on the shadow docket were perceived to be anodyne: denying petitions for certiorari in un-controversial cases; denying applications for emergency relief in cases presenting no true emergency; granting parties additional time to file briefs; dividing up oral arguments; and so on.

That's not to say that there were *never* controversial rulings on the shadow docket; from the execution of the Rosenbergs[7] to Justice Douglas halting President Nixon's bombing of Cambodia[8] to the initial stay of the Florida recount in what became *Bush* v. *Gore*,[9] there certainly have been significant and controversial rulings on the shadow docket across the Court's modern history. But the shadow docket rulings that provoked public and scholarly attention were sufficiently few and far between that scholarly focus tended to focus on their substance — rather than their procedure. And even as the number of significant shadow docket orders crept upwards in the 1980s, most of those rulings came in capital cases — as various doctrinal shifts provoked a surge in eleventh-hour litigation seeking to halt scheduled executions (or lift lower-court orders halting executions).[10]

Because the Court so rarely settled divisive disputes through the shadow docket (outside of the election and death penalty contexts, anyway), the most frequent litigants before the Court did not tend to rely upon it. To take just one example, from 2001–17, across two very different two-term presidencies, the Justice Department (by far, the most common litigant before the Supreme Court) only sought emergency relief from the Justices eight times — once every

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6. Unlike merits decisions, shadow docket rulings can appear in any of four different places on the Supreme Court's website — as an "opinion of the Court"; an "opinion relating to orders"; a published order of the Court; or an unpublished order by an individual Justice that is reflected only on the Court's docket. This is a minor point, to be sure, but it's even harder to *find* these orders relative to merits decisions.

7. *See Rosenberg* v. *United States*, 346 U.S. 313 (Douglas, Circuit Justice 1953).

8. *See Holtzman* v. *Schlesinger*, 414 U.S. 1316 (Douglas, Circuit Justice 1973).

9. *See Bush* v. *Gore*, 531 U.S. 1046 (2000) (mem.).

10. *See generally* CAROL S. STEIKER & JORDAN M. STEIKER, COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT (2016) (documenting the doctrinal shifts in post-conviction capital litigation and their implications for emergency appeals).

other Term.[11] Although the Court granted four of those requests and denied four,[12] only *one* of the eight orders in those cases provoked any of the Justices to publicly dissent.[13] Compared to what we have seen over the past four-plus years, the contrast is striking.

II. THE RISE OF THE SHADOW DOCKET SINCE 2017

There's no perfect way to measure the rise of the shadow docket. It's a large dataset to begin with (encompassing thousands of orders each year), and it's hard to separate out the significant rulings (which are *always* a relatively small percentage of the total number of orders the Court hands down) from the insignificant ones. Complicating matters, neither SCOTUSblog nor the *Harvard Law Review*, which separately keep quasi-official "statistics" tracking the Court's work, have previously tracked *orders* other than those relating to stays of execution — although the *Harvard Law Review*'s statistics for the October 2020 Term *will*, for the first time, include more shadow docket data when they are published this November.

My focus, at least thus far, has been almost entirely on applications for emergency relief — where a party asks the Supreme Court to provide relief from a lower-court decision pending further litigation (either in the lower courts or in the Supreme Court).[14] Although there may be other examples,[15] the four most common examples are orders: (1) staying a lower-court decision and/or mandate pending appeal; (2) vacating a stay (*e.g.*, of an impending execution)

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11. Stephen I. Vladeck, *The Supreme Court, 2018 Term — Essay: The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123, 162 tbl.3 (2019).

12. *See Veasey* v. *Perry*, 135 S. Ct. 9 (2015) (mem.); *United States* v. *Comstock*, No. 08A863 (Roberts, Circuit Justice Apr. 3, 2009) (mem.); *Dep't of Health & Human Servs.* v. *Alley*, 556 U.S. 1149 (2009) (mem.); *Gates* v. *Bismullah*, 554 U.S. 913 (2008) (mem.); *Rumsfeld* v. *Rell*, No. 05A231 (Ginsburg, Circuit Justice Sept. 8, 2005); *Ashcroft* v. O Centro Espirita Beneficente Uniao do Vegetal, 543 U.S. 1032 (2004) (mem.); *Bush* v. *Gherebi*, 540 U.S. 1171 (2004) (mem.); *Ashcroft* v. *N. Jersey Media Grp.*, 536 U.S. 954 (2002) (mem.).

13. *Veasey*, 135 S. Ct. at 10 (Ginsburg, J., dissenting).

14. There are other contexts in which recent years have seen significant shifts in the Court's procedural practices. To take just one example, the Court had not granted a single petition for a writ of certiorari "before judgment" (an extraordinary vehicle through which the Court can conduct expedited plenary merits review before a court of appeals has ruled on a case) between August 2004 and January 2018. Over the last three-and-a-half years, it has granted 10. *See* Steve Vladeck (@steve_vladeck), TWITTER (Sept. 24, 2021, 12:24 p.m.), https://twitter.com/steve_vladeck/status/1441438408442736652.

15. Prior to the Bail Reform Act of 1984, for instance, it was far more commonplace for Circuit Justices to receive applications for bail and/or release pending appeal (or applications to vacate lower court orders granting such interim relief) — and to grant them. *See* STEPHEN M. SHAPIRO ET AL., SUPREME COURT PRACTICE §§ 17.15–17.21 (11th ed. 2019).

imposed by a lower court; (3) granting an emergency writ of injunction pending appeal; and (4) vacating a lower-court's grant of an emergency injunction.

Here is a table documenting the frequency of these types of relief since Chief Justice Roberts's first Term (the October 2005 Term, or "OT2005"):

Table 1. Total Grants of Emergency Relief by Supreme Court Term (OT2005–Present)[16]

Term	Grant Stay	Vacate Stay	Grant Injunction	Vacate Injunction	Total
OT2020[17]	7	5	7	1	**20**
OT2019	15	4	0	1	**19**
OT2018	12	3	0	0	**15**
OT2017	9	0	0	0	**9**
OT2016	10	1	0	0	**11**
OT2015	11	1	1	0	**13**
OT2014	7	2	1	0	**10**
OT2013	4	2	2	0	**8**
OT2012	1	0	0	0	**1**
OT2011	6	0	0	0	**6**
OT2010	6	0	0	0	**6**
OT2009	3	1	0	0	**4**
OT2008	8	0	0	0	**8**
OT2007	7	0	0	0	**7**
OT2006	1	0	0	0	**1**
OT2005	6	0	0	0	**6**

16. The data were collected by running a series of different searches through Westlaw's Supreme Court database. Given the different terminology that the Court (and individual Justices) use in describing emergency relief in some of these contexts, there may be slight variations compared to any official data source (if one exists).

17. The October 2020 Term does not formally end until 11:59 p.m. EDT this coming Sunday, October 3, 2021. *See* 28 U.S.C. § 2 ("The Supreme Court shall hold at the seat of government a term of court commencing on the first Monday in October of each year . . . ."). This data is complete as of Monday, September 27.

These numbers help to show that, especially in the last few years, the Court has been granting emergency relief far more often than before. But the uptick in shadow docket rulings granting applications for emergency relief is far more than *quantitative*; there have also been at least six distinct respects in which the past four years have seen *qualitative* shifts in the nature of the Court's rulings on applications for emergency relief, as well.

a. Six Changes in How SCOTUS Uses the Shadow Docket

First, excepting ordinary grants of certiorari, as the chart on the previous page shows, there are a lot more cases in which the Justices are using the shadow docket not only to grant emergency relief — where the Court's summary action disrupts what was previously true under rulings by lower courts — but to grant emergency writs of injunction, which are supposed to be the most extraordinary and unusual form of such relief. Consider, for example, the order handed down at 11:34 p.m. EDT on Friday, April 9 in *Tandon* v. *Newsom*, in which a 5-4 majority issued an emergency "writ of injunction" to block California's COVID-based limits on in-home gatherings to members of no more than three households on the ground that it violated the Free Exercise Clause.[18] Neither the district court nor the Ninth Circuit had blocked California's limits, so it was the Justices, in the first instance, who put them on hold. Indeed, *Tandon* was the sixth of *seven* emergency writs of injunction issued by the Court since November 2020 — after it hadn't issued a single emergency injunction since 2015, and had issued only *four* since Chief Justice Roberts's 2005 confirmation.[19]

What these injunctions underscore is that the *kind* of emergency relief the Court is issuing has changed. Even when the Court was granting a handful of stays between 2005 and 2013, for instance, most involved executions — where the ruling had little impact beyond the case at issue. Now, in contrast, many of these rulings are either directly enjoining statewide policies (as in *Tandon*) or staying lower-court rulings that had enjoined state/federal policies. In that respect, these emergency rulings are having a far broader *substantive* impact, for better or worse, compared to emergency rulings in the past.

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18. 141 S. Ct. 1294 (2021) (per curiam).

19. The other five prior to *Tandon* were in *Gateway City Church* v. *Newsom*, 141 S. Ct. 1460 (2021) (mem.); *South Bay Pentecostal Church* v. *Newsom* ("*South Bay II*"), 141 S. Ct. 716 (2021) (mem.); *Harvest Rock Church* v. *Newsom*, 141 S. Ct. 1289 (2021) (mem.); *Roman Catholic Diocese of Brooklyn* v. *Cuomo*, 141 S. Ct. 63 (2020) (per curiam); and *Agudath Israel of Am.* v. *Cuomo*, 141 S. Ct. 889 (2020) (mem.). The seventh was *Chrysafis* v. *Marks*, No. 21A8, 2021 WL 3560766 (U.S. Aug. 12, 2021) (per curiam). For the 2015 example, see *Akina* v. *Hawaii*, 577 U.S. 1024 (2015) (mem.).

Second, the shadow docket during the Trump administration saw a remarkable increase in action from the Solicitor General. In contrast to the eight applications for emergency relief filed by the Justice Department between January 2001 and January 2017 that I described above, the Justice Department filed *41* applications for such relief during Trump's presidency — asking the Justices to intervene at a preliminary stage of litigation more than 20 times as often as either of its immediate predecessors.[20] Emergency applications became such a central feature of the Office of the Solicitor General during the Trump administration that it even led to a restructuring of the Office's staff.[21] And the dramatic increase in applications paid dividends. Not counting one application that was held in abeyance and four that were withdrawn, the Justices granted 24 of the 36 remaining applications in full, and another four in part. Even among the eight applications that were denied in full, only three were denied with prejudice. Thus, not only was there a dramatic increase in the *demand* for shadow docket rulings from the Court's "Tenth Justice," but the Justices — or at least a majority of them — were willing to go along with it.

Third, both in cases in which the Solicitor General sought emergency relief and otherwise, the shadow docket has become far more publicly divisive in recent years. I already noted that only one of the eight applications filed by the Bush 43 or Obama Justice Departments provoked *any* public dissent. In contrast, 27 of the 36 applications from the Trump administration on which the Justices ruled provoked at least one Justice to publicly dissent. And expanding the focus beyond applications from DOJ, there has been a sharp increase in the total number of shadow docket rulings that have provoked four (and even three) public[22] dissents. During the October 2017 Term (Justice Kennedy's last on the Court), for instance, there were exactly *two* shadow docket rulings with four public dissents. In the next two Terms, there were 20. Indeed, during the October 2019 Term, there were almost as many public 5-4 rulings on the shadow docket (11) as there were on the merits docket (12).[23]

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20. For the final data on Trump administration filings, see Steve Vladeck (@steve_vladeck), TWITTER (Jan. 20, 2021, 11:21 a.m.), https://twitter.com/steve_vladeck/status/1351927798882066436.

21. *See* Steve Vladeck, *Symposium: The Solicitor General, the Shadow Docket, and the Kennedy Effect*, SCOTUSBLOG, Oct. 22, 2020, https://www.scotusblog.com/2020/10/symposium-the-solicitor-general-the-shadow-docket-and-the-kennedy-effect/.

22. As noted below, this qualifier is important: Except when four Justices dissent (or three dissent from an order denying certiorari), we usually can only guess as to how the Justices voted on unsigned orders — or even unsigned opinions.

23. *See* Steve Vladeck, *The Supreme Court's Most Partisan Decisions Are Flying Under the Radar*, SLATE, Aug. 11, 2020, https://slate.com/news-and-politics/2020/08/supreme-court-shadow-docket.html.

Even *this* Term (the Court's first without Justice Ginsburg), there have been six orders with four public dissents,[24] compared to eight 5-4 merits rulings. And there have been 29 orders respecting emergency applications from which at least three Justices publicly dissented — more than ***twice*** the total from any prior year that I've tracked.[25] What's more, these dissents are homogenously ideological; there hasn't been a ***single*** dissent respecting an application for emergency relief in which a Justice to the left of Chief Justice Roberts was joined by a Justice to his right. There are no "strange bedfellows" on the shadow docket. Indeed, the volume and homogeneity of shadow docket dissents tells something of a different story about the Court than the merits docket. If one looks at rulings from which (at least) all three Democratic appointees dissented, there were only 10 "merits" cases during OT2020. In contrast, there were 25 *orders* from which Justices Breyer, Sotomayor, and Kagan each dissented — and four from which they were the *only* public dissenters.[26]

Fourth, although it has long been a criticism of the shadow docket, especially denials of certiorari, that the public usually has no idea how many Justices voted for a specific outcome (let alone *which* Justices), that concern has become that much more pronounced as the *public* tally has increasingly reflected multiple dissents. Consider, in this respect, the Court's February 2021 order refusing Alabama's request to vacate a lower-court injunction that had blocked a scheduled execution.[27] Four Justices joined in an opinion explaining the basis for their concurrence.[28] Only three Justices noted dissents.[29] So we know that either (or both) of Justices Alito and Gorsuch joined the majority to block the execution. But we have no idea which of them, or if they both did, or why. Stealth votes aren't new,[30] but as the shadow docket grows in both

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24. *See Whole Woman's Health* v. *Jackson*, No. 21A24, 2021 WL 3910722 (U.S. Sept. 1, 2021) (mem.); *Tandon*, 141 S. Ct. 1294; *Roman Catholic Diocese of Brooklyn* v. *Cuomo*, 141 S. Ct. 63 (2020) (per curiam); *Agudath Israel* v. *Cuomo*, 141 S. Ct. 889 (2020) (mem.); *Scarnatti* v. *Boockvar*, 141 S. Ct. 644 (2020) (mem.); *Republican Party of Pa.* v. *Boockvar*, 141 S. Ct. 643 (2020) (mem.).

25. *See* Steve Vladeck (@steve_vladeck), TWITTER (Sept. 5, 2021, 11:27 a.m.), https://twitter.com/steve_vladeck/status/1434568812045742086?s=20.

26. *See* Steve Vladeck (@steve_vladeck), TWITTER (Sept. 2, 2021, 12:25 a.m.), https://twitter.com/steve_vladeck/status/1433284987806261250?s=20.

27. *Dunn* v. *Smith*, 141 S. Ct. 725 (2021) (mem.).

28. *Id.* at 725 (Kagan, J., concurring).

29. *Id.* at 726 (Kavanaugh, J., dissenting).

30. For an example of why we can't infer from the fact that *some* Justices publicly noted their dissents that there weren't other dissenters, see *Arthur* v. *Dunn*, 137 S. Ct. 14, 15 (2016)

absolute terms and divisiveness, the stealth votes are increasingly the *dispositive* ones — which, among other things, complicates efforts to decipher the potential impact of the Court's ruling beyond the instant case.

Fifth, accompanying the rise of the shadow docket has been the rise of new (and unusual) forms of relief. Consider the aftermath of the "*South Bay II*" decision handed down on February 5,[31] in which the Court, in an unsigned order, issued an emergency writ of injunction barring California from enforcing at least some of its COVID-related restrictions on indoor worship services. The following Monday, the Court issued an order in another California case in which a plaintiff had also sought an emergency injunction. Instead of granting the injunction, the Court treated the application as it if were seeking a petition for a writ of certiorari *before judgment* (itself an unusual procedural vehicle).[32] It granted the petition and issued a "GVR," *i.e.*, a summary order granting the petition; vacating the district court's order; and remanding "for further consideration in light of" *South Bay II* — itself an unsigned order that was not accompanied by an opinion of the Court.[33] What about the Court's summary ruling in *South Bay II* was supposed to lead the district court to reconsider its prior ruling? To similar effect, on January 15, the Court granted another petition for certiorari before judgment in a federal death penalty case — and, unlike the "GVR" order in *Gish*, summarily *reversed* the district court on the merits.[34] That is, the Court jumped over the Court of Appeals and issued a one-sentence merits ruling. I haven't found a single other instance of the Court issuing such a summary merits ruling in that posture (cert. before judgment).

Finally, as the *Gish* order suggests, the dramatic increase in significant shadow docket rulings has brought with it novel questions about how lower courts are supposed to give precedential effect to rulings that the Supreme Court has *itself* previously suggested are of little precedential value.[35] For instance, a panel of the Fourth Circuit split sharply in August 2020 over what

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(statement of Roberts, C.J.) (noting that he was providing a courtesy fifth vote to grant a stay in an order from which only two Justices publicly dissented — and none recused).

31. *S. Bay United Pentecostal Church* v. *Newsom*, 141 S. Ct. 716 (2021) (mem.).

32. *See supra* note 14.

33. *Gish* v. *Newsom*, 141 S. Ct. 1290 (2021) (mem.).

34. *United States* v. *Higgs*, 141 S. Ct. 645 (2021) (mem.).

35. *See, e.g.*, *Lunding* v. *N.Y. Tax Appeals Tribunal*, 522 U.S. 287, 307 (1998) ("Although we have noted that '[o]ur summary dismissals are . . . to be taken as rulings on the merits in the sense that they rejected the specific challenges presented . . . and left undisturbed the judgment appealed from,' we have also explained that they do not 'have the same precedential value ... as does an opinion of this Court after briefing and oral argument on the merits.'" (citation omitted) (alteration in original)).

to make of how the Supreme Court had handled emergency applications in different cases brought by different parties challenging the same underlying governmental policy.[36] And D.C. district judge Trevor McFadden has even published a paper, together with one of his former clerks, attempting to taxonomize the different kinds of shadow docket rulings and what their value as precedent should — and should not — be.[37] In the unsigned majority opinion in *Tandon*, the Court made this problem explicit, chastising the Ninth Circuit for refusing to give effect to four prior rulings involving California COVID restrictions — *none* of which had been accompanied by a majority rationale.[38]

Simply put, it is no longer possible for any reasonable observer to dispute that there has been a dramatic uptick in significant, broad-impact rulings on the shadow docket in the past few years; that these rulings have been unusually divisive; that they are leading to novel forms of procedural relief from the Court; and that their substantive effects are causing significant uncertainty both in lower courts and among those government officers, lawyers, and court-watchers left to parse what, exactly, these rulings portend both for the specific policies at issue and for the broader contours of the relevant legal doctrines.

b. What Caused the Rise of the Shadow Docket?

There is no single explanation for the source of this uptick. The most common effort to downplay the uptick as a source of concern is to suggest that it's the result of a unique confluence of one-off factual circumstances — the increase in "nationwide" injunctions during the Trump administration; the unique legal issues arising out of government reactions to the COVID-19 pandemic; the flurry of litigation relating to the 2020 elections; shifts in standing doctrine; increased forum-shopping; etc. On this view, the Justices are merely reacting to circumstances beyond their control, and so the roots of (and any solutions to) the shifts documented above lay elsewhere.

With respect to those advancing these arguments, I fear that they rest on an incomplete assessment of the Court's "shadow docket" jurisprudence — which has never invoked *any* of these developments as a justification for the uptick. My own view is that the surge in high-profile shadow docket rulings can best be traced to a confluence of four factors: (1) subtle procedural changes that have made it easier for the Court to act collectively even when the Justices are

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36. *Compare Casa de Maryland, Inc.* v. *Trump*, 971 F.3d 220, 229–30 (4th Cir. 2020), *with id.* at 281 n.16 (King, J., dissenting). The Fourth Circuit has agreed to rehear *Casa de Maryland* en banc. *See Casa de Maryland, Inc.* v. *Trump*, 981 F.3d 311 (4th Cir. 2020).

37. *See* Trevor N. McFadden & Vetan Kapoor, *The Precedential Effects of the Supreme Court's Emergency Stays*, 44 HARV. J.L. & PUB. POL'Y 827 (2021).

38. *See Tandon* v. *Newsom*, 141 S. Ct. 1294, 1297–98 (2021) (per curiam).

physically dispersed; (2) a subtle but significant shift in how a majority of the Justices *apply* the traditional four-part standard for emergency relief pending appeal; (3) the effects of the changing composition of the Court on both the substance and procedure of these disputes; and (4) repetition — where what used to be extraordinary has increasingly become routine.

Before briefly outlining these shifts, let me first debunk one of the most common claims about the rise of the shadow docket — that it is a response to the rise of "nationwide" injunctions. Practically and empirically, that's just not true. First, that only describes cases in which the federal government is the party invoking the shadow docket — which, as the myriad election and COVID cases of the past year drive home, is only one modest slice of the shadow docket. Without considering any of those cases, we've still seen a dramatic uptick.

Second, even *within* the DOJ slice of the data, fewer than half of the Trump administration's applications for emergency relief involved nationwide injunctions. Rather, the theory on which the Trump administration routinely (and usually successfully) litigated most of its applications was that *any* injunction of a government policy created the kind of irreparable harm that justified emergency relief. That's why, after staying a "nationwide" injunction against the "public charge" rule,[39] the Court *separately* (and later) voted to stay an Illinois-only injunction against the same rule;[40] the geographic scope of the injunction just wasn't the driving consideration. Nor can the uptick be traced only (or even largely) to COVID-19 or 2020 election disputes. As Table 1 (pg. 5) demonstrates, the uptick really began to emerge during OT2014 — years before either of those topics were remotely on our radar. Indeed, there have been any number of momentary justifications for at least some of the uptick in emergency orders. The larger point is that none of these provocations explains either the overall trend or the *substance* of the Court's reactions thereto.

To take just one case in point, consider the *Mifeprex* dispute. There, a district judge had blocked the FDA's requirement that Mifeprex, an FDA-approved medication used to terminate early pregnancies, be dispensed in person only by licensed pharmacies — relying on the difficulties that the in-person dispensation requirement imposed at the height of the COVID-19 pandemic. After the Court of Appeals refused to stay the ruling, the Trump Administration sought an emergency stay pending appeal — filing its application on August 26, 2020.[41] This was not a nationwide injunction; it was

39. *See Dep't of Homeland Sec.* v. *New York*, 140 S. Ct. 599 (2020) (mem.).

40. *See Wolf* v. *Cook County, Ill.*, 140 S. Ct. 681 (2020) (mem.).

41. *See Food & Drug Admin.* v. *Am. Coll. of Obstetricians & Gynecologists*, No. 20A34 (U.S. filed Aug. 26, 2020).

not an election case; it was not a religious liberty dispute. And a lower-court ruling that provided pregnant women with easier access to an FDA-approved medication was, whatever its merits, hardly an "emergency."

The Court sat on the application for months (complicated, perhaps, by Justice Ginsburg's death while the application was pending). Finally, over three public dissents, the Court granted the government's application on January 12, 2021[42] — four-and-a-half months after it was filed. During that same time period, the Court: (1) added to its merits docket a challenge to President Trump's proposal to exclude undocumented immigrants from the post-Census reapportionment; (2) received full merits and *amicus* briefings; (3) heard oral argument; and (4) handed down a lengthy merits opinion.[43] In other words, the Court clearly had time to elevate the dispute to its merits docket if it wanted to; it just didn't want to.

To me, the best explanation is that the rise of the shadow docket reflects a more nuanced (and longer-developing) confluence of catalysts. For instance, it used to be standard practice for the Justices to resolve most contentious shadow docket disputes by themselves — "in chambers," acting as the Circuit Justice for the Court of Appeals from which the dispute arose. Into the 1970s, Justices would often even hear oral argument in such contexts, and routinely published opinions *as* Circuit Justices setting forth their rationale for granting or denying emergency relief (Justice Douglas once famously nailed such an order to a tree).

But two shifts starting in the 1980s moved away from this practice. First, the Court stopped formally adjourning for its summer recess — so that the Court was technically *always* "in session," even when the Justices were scattered across the globe.[44] This made it easier for the full Court to act on especially contentious cases — and took significant authority away from the individual Circuit Justices. Second, and related, although individual Justices often heard argument in chambers in shadow docket disputes (especially on matters they perceived to be of public importance[45]), the full Court, as a matter

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42. *See Food & Drug Admin.* v. *Am. Coll. of Obstetricians & Gynecologists*, 141 S. Ct. 578 (2021) (mem.).

43. *See Trump* v. *New York*, 141 S. Ct. 530 (2020) (per curiam). The jurisdictional statement in *New York* was filed on September 22, 2020; and argument was held on November 30.

44. *See* SHAPIRO, *supra* note 15, § 1.2(F).

45. *See, e.g.*, *Cousins* v. *Wigoda*, 409 U.S. 1201, 1201 (Rehnquist, Circuit Justice 1972) ("Because applicants' application raised what seemed to me to be significant legal issues of importance not only to them but to the public as a whole, I heard oral argument of counsel on the application.").

of practice (but not formal rule) did not.[46] Thus, the Court slowly normalized the practice of issuing orders, even in contentious cases, by the full Court, without meeting in person, and without any opportunity for oral argument.[47]

As the Court's procedures shifted subtly, its composition shifted dramatically. It's not just that the two most recent appointments have moved the Court rightward; it's that they also appear to have provided a fifth (and sixth) vote for a particular (and idiosyncratic) view of *when* the Court should issue emergency relief. As I've explained in detail elsewhere, there now appears to be a majority of Justices who believe that, when *any* government action is enjoined by a lower court, the government is irreparably harmed, and the equities weigh in favor of emergency relief *no matter* the consequences to those who might be injured by allowing the policy to remain in effect.[48] Not only did Justice Kennedy never expressly endorse this view (which may help to explain why the uptick has dramatically accelerated since his retirement), but the underlying justification for this approach does not actually hold up to meaningful scrutiny; it just gets repeated as if its logic is beyond dispute.[49]

The upshot is that emergency relief now appears to rise and fall almost entirely on the merits — with virtually no regard for whether the *other* factors that are usually required (whether by custom, rule, or statute) for such relief are in fact present. Once again, *South Bay II* stands out. Although there were four statements from the six Justices in the majority,[50] *none* of them purported to apply the four-factor test the Court traditionally follows when considering

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46. SHAPIRO ET AL., *supra* note 15, § 17.2.

47. In the 1973 Cambodia bombing case, one of Justice Douglas's central objections to the denouement — where Justice Marshall obtained the telephone acquiescence of the other seven Justices in his effective overruling of Douglas — was that it short-circuited both formal rules and informal norms concerning what had to happen before the full Court reached a decision. *See Holtzman* v. *Schlesinger*, 404 U.S. 1321, 1323–26 (Douglas, J., dissenting from grant of stay).

48. Vladeck, *supra* note 11, at 131–32.

49. This view appears to originate with then-Justice Rehnquist, who traced the idea to the "presumption of constitutionality" that accompanies (most) government action. *See New Motor Vehicle Bd. of Cal.* v. *Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (Rehnquist, Circuit Justice 1977); *see also Maryland* v. *King*, 567 U.S. 1301, 1303 (Roberts, Circuit Justice 2012) (endorsing Rehnquist's formulation). But the presumption of constitutionality (1) is principally about *statutes*, not executive action; (2) is supposed to yield when constitutional rights are implicated; and (3) is, in any event, not a justification for declining to take into account the harm caused by *allowing* the policy to remain in effect pending appeal. *See* Vladeck, *supra* note 11, at 132 n.60.

50. *See South Bay II*, 141 S. Ct. at 716 (notation of Alito, J.); *id.* (Roberts, C.J., concurring); *id.* at 717 (Barrett, J., concurring); *id.* (statement of Gorsuch, J.).

whether to grant an injunction. Instead, all of the discussion, and all of the Justices' analysis, was focused on the merits of the First Amendment dispute.

Worse still, the grant of an emergency injunction in *Tandon* — which, unlike *South Bay II*, came with a four-page per curiam opinion for the Court adopting a *new* understanding of the Free Exercise Clause — necessarily exceeded the Court's *statutory* authority to issue such relief. As the Justices have long explained, because the Court's authority to issue emergency injunctions derives from the All Writs Act, and not 28 U.S.C. § 2101, such relief is supposed to be available only "where the legal rights at issue are 'indisputably clear.'"[51] It ought to follow that newly minted rights, such as the one *Tandon* articulated, cannot justify an emergency injunction pending appeal. As an exercise of appellate jurisdiction via the All Writs Act, the relevant question is supposed to be whether the *lower courts* indisputably erred in denying relief. A court bound by prior precedent failing to anticipate a shift in constitutional doctrine hardly can commit such error.

And yet, using what are supposed to be emergency *procedural* rulings to effect *substantive* changes in the law is increasingly the norm in these contexts — which may also help to explain why it's happening so much more often. The more that the Justices issue emergency relief on the shadow docket, especially in cases in which it might not previously have been available, the more the standard for such relief is necessarily diluted — making it easier for the next applicant to state a claim. Issuing such relief through either unsigned orders or cryptic unsigned opinions may also be *easier* for the Justices than doing so through lengthy merits opinions more likely to divide even those who agree as to the bottom line.[52]

As the merits have become the all-but exclusive consideration in shadow docket cases, it is hardly surprising that positions likely to resonate with the Court's conservative majority are faring better. But the shadow docket also helps to illustrate how the shift in the Court's composition has also had *procedural* consequences. For instance, in *Tandon*, just as in *Roman Catholic Diocese* and its companion case in November, Chief Justice Roberts joined the

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51. *Ohio Citizens for Responsible Energy, Inc.* v. *Nuclear Regulatory Comm'n*, 479 U.S. 1312, 1313 (Scalia, Circuit Justice 1986) (quoting *Communist Party of Ind.* v. *Whitcomb*, 409 U.S. 1235, 1235 (Rehnquist, Circuit Justice 1972).

52. In that respect, compare *Tandon* with *Fulton* v. *City of Philadelphia*, 141 S. Ct. 1868 (2021), in which the Justices divided over whether to overrule *Employment Division* v. *Smith*, 494 U.S. 872 (1990). *Tandon*, which takes a pretty healthy bite out of *Smith*, reached the Court a full year after *Fulton* had been granted, and months after it had been briefed, argued, and voted upon — and yet it was decided before *Fulton* with the Justices *knowing* how *Fulton* was going to come down. Only two Justices in the *Tandon* majority — Justices Kavanaugh and Barrett — joined Chief Justice Roberts's narrower opinion in *Fulton*.

three Democratic appointees in dissenting from the majority's decision to grant an emergency injunction pending appeal. Repeatedly, the Chief Justice has dissented on procedural grounds even in cases in which he agreed (or likely agreed) with the majority on the merits. That's why, as much as in any other context this Term, Justice Barrett's confirmation in place of Justice Ginsburg had a direct and immediate impact on the *results* of the Court's decisions.

But the shift in composition is relevant not only with respect to emergency relief such as stays or injunctions, but also with respect to summary reversals of lower courts — for which there is at least a norm (if not a rule) that *six* votes, not five, are required (on the theory that any four Justices could grant plenary review, and so it takes six to prevent that from happening). Thus, the Court's novel January 15 ruling in *Higgs*[53] — a summary reversal on a petition for a writ of certiorari before judgment — seems possible only *because* there are no longer four Justices who would dissent from such a procedural move.

Simply put, if a majority of the Justices are now of the view that the merits are the predominant consideration in considering emergency applications (even without the consistent support of Chief Justice Roberts, who has dissented from some of those rulings), and if six Justices are willing to summarily dispose of the merits even in novel procedural contexts, then that not only explains why we've seen such a dramatic uptick on the shadow docket in the last few years, but it also suggests that this shift is here to stay even as COVID cases wane and even if the Biden administration is less aggressive in pursuing (or the Justices are less solicitous in providing) such relief going forward.[54] Instead, the focus will likely shift, as we have already seen, to cases in which *states* are parties, or cases in which those *challenging* federal policies are asking the Justices to intervene to freeze a lower-court ruling in favor of the federal government — as with the Clean Power Plan late in the Obama administration,[55] and the CDC's eviction moratorium in the Biden administration.[56]

Finally, it's worth noting that, whatever the cause of this uptick, it has almost nothing to do with Congress — which hasn't touched the Court's

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53. *United States* v. *Higgs*, 141 S. Ct. 645 (2021) (mem.).

54. To date, the Biden administration has filed exactly one application for emergency relief in the Supreme Court — in the "Remain in Mexico" case. Over three public dissents, the Court denied its application for a stay of a nationwide injunction issued by a Texas district court. *See Biden* v. *Texas*, No. 21A21, 2021 WL 3732667 (U.S. Aug. 24, 2021) (mem.).

55. *See West Virginia* v. *EPA*, 136 S. Ct. 1000 (2016) (mem.).

56. *See Ala. Ass'n of Realtors* v. *Dep't of Health & Human Servs.*, No. 21A23, 2021 WL 3783142 (U.S. Aug. 26, 2021) (per curiam); *see also Ala. Ass'n of Realtors* v. *Dep't of Health & Human Servs.*, 141 S. Ct. 2320 (2021) (mem.).

jurisdiction or procedures in any meaningful way since 1988. Even the change in the Court's Term — from one that formally ended with the summer recess to a "continuous" Term — was accomplished via a largely unnoticed 1990 amendment of Rule 3 of the Court's rules.[57] Everything else has come, by all appearances, through unexplained behind-the-scenes shifts in how the Court applies its own standards for emergency relief under statutes that Congress has not disturbed in decades.

III. (SOME OF) THE PROBLEMS WITH THE RISE OF THE SHADOW DOCKET

The uptick identified above is not simply an assessment of volume. Rather, the Supreme Court's significant shadow docket rulings in recent years have had dramatic real-world impacts — from allowing controversial immigration policies affecting millions to go into effect[58] to clearing the way for the first federal executions in 17 years;[59] from blocking state-wide COVID restrictions[60] and rulings by lower federal courts extending access to the polls in the 2020 election[61] to staying out of cases after the election seeking to overturn the result.[62] Reasonable minds will surely disagree about the merits of each (and all) of these rulings. But it seems important to me to highlight some of the many ways in which handing down significant rulings via the shadow docket is problematic *even* to those who think the Court is generally getting the merits of most (or even all) of these disputes "right."

1. The absence of reasoning. Most significantly, these rulings are generally coming down without any explanation from a majority of the Justices as to their reasoning, leaving not only the parties and lower courts but other actors who might be affected by the decision (*e.g.*, state executive officials) to speculate as to *why* the Court ruled the way it did. At the very least, if, as I've suggested above, the Justices truly are focusing on the merits to the exclusion of all other considerations in applications for emergency relief, it might behoove them to say so — so that lower courts stop applying what may increasingly be

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57. Prior to the rule change, if the Court needed to decide a case en banc during the summer recess, it had to return for a "Special Term," of which there were five during the twentieth century: one in 1942; two in 1953; one in 1958; and one in 1972.

58. *See, e.g.*, *Trump* v. *Int'l Refugee Assistance Proj.*, 137 S. Ct. 2080 (2017) (mem.).

59. *See Barr* v. *Lee*, 140 S. Ct. 2590 (2020) (per curiam).

60. *See, e.g.*, *S. Bay United Pentecostal Church* v. *Newsom* ("*South Bay II*"), 141 S. Ct. 716 (2021) (mem.).

61. *See Merrill* v. *People First of Ala.*, 141 S. Ct. 25 (2020) (mem.).

62. *See, e.g.*, *Gohmert* v. *Pence*, 141 S. Ct. 972 (2021) (mem.); *Texas* v. *Pennsylvania*, 141 S. Ct. 1230 (2020) (mem.); *Kelly* v. *Pennsylvania*, 141 S. Ct. 950 (2020) (mem.).

the *wrong* standard. Either way, the lack of reasoning makes it impossible to scrutinize the merits of the Court's action in far too many of these cases.

2. The anonymity of the vote. The uncertainty over which Justices voted which way, especially on contentious issues, also perpetuates uncertainty among parties and lower courts — who have been instructed by the Supreme Court to generally give weight to the "narrowest" view that commands the support of a majority of the Justices.[63] When, as in the *Dunn* v. *Smith* ruling in February, we don't even know *who* the fifth (and perhaps sixth) votes were in support of a shadow docket ruling, that only further complicates efforts to figure out exactly what the Court has commanded.

3. The unpredictable timing of decisions. Another issue that has arisen with the rise of the shadow docket has been the proliferation of what Bloomberg Supreme Court reporter Greg Stohr has called the "night Court" — with decisions often coming down late in the evening (or very early in the morning), especially on Friday nights.[64] In July 2020, for example, the Court handed down *major* rulings clearing the way for the first federal executions in 17 years in a pair of 5-4 decisions that came at 2:10 a.m. EDT one night and at 2:46 a.m. EDT two nights latr. Executions raise unique timing concerns with respect to last-minute stay applications (or applications to lift stays), but even cases with no comparable urgency have led to late-night rulings — such as the decision in *South Bay II*, which came at 10:44 p.m. EST on a Friday night *six days* after briefing had been completed, or the ruling in *Tandon* at 11:34 p.m. EDT on a Friday night two months later. Likewise, the Court's significant ruling blocking New York's COVID-based restrictions on certain religious services in *Roman Catholic Diocese of Brooklyn* v. *Cuomo* was handed down at 11:56 p.m. EST on Wednesday, November 25 — the night before Thanksgiving. There's a reason why the Court follows a longstanding protocol for when it hands down rulings in argued cases. Among other things, it increases public access to and awareness of the decisions. Indeed, the hand-down announcements are even recorded and eventually published. Here, in contrast, the rulings are handed down in a manner that makes them that much more *in*accessible.[65]

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63. *See Ramos* v. *Louisiana*, 140 S. Ct. 1390, 1403 (2020) (citing *Marks* v. *United States*, 430 U.S. 188, 193 (1977)).

64. Greg Stohr (@gregstohr), TWITTER (Feb. 6, 2021, 1:02 p.m.), https://twitter.com/GregStohr/status/1358113817696288769?s=20.

65. In his testimony to the Presidential Commission on Supreme Court reform, Professor Sam Bray described these concerns as "trivial." I strongly disagree. There are good reasons for the Court's normal practices when it comes to handing down merits rulings — reasons sounding principally but not exclusively in public accessibility and transparency. Yes, it is

4. The lack of merits briefing, *amicus* participation, and/or oral argument. Deciding significant questions through the shadow docket also deprives any number of affected parties of the opportunity to participate, including through the filing of friend-of-the-Court briefs. Although the Supreme Court's rules do not preclude the filing of such *amicus* briefs in conjunction with shadow docket applications, the timing makes them exceedingly difficult, especially in support of the *respondents* — who, unlike the applicants, may have virtually no advance notice that the matter is going to the Supreme Court. Anecdotally, the Clerk's Office has even been known to describe *amicus* filings with respect to applications as being "disfavored." And effectively handing down merits decisions on the shadow docket also deprives the parties of a chance to fully brief the merits (as opposed to briefing whether *emergency relief* is warranted) *and* oral argument — notwithstanding the settled view that both of those are salutary features of the Court's plenary consideration.

5. The problems with predictions. The above concerns all go to the transparency of the Court's decisions and the opportunities of interested parties to help shape them. But even on their merits, shadow docket rulings suffer from multiple flaws, including the difficulties of making predictive judgments about the merits of a dispute so early in the progress of litigation. Consider, in this respect, the Court's shadow docket ruling issuing a partial stay of two district court injunctions against the second iteration of President Trump's travel ban.[66] Presumably (although we'll never know), that decision reflected a judgment by a majority of the Justices that they would uphold that policy if and when it reached them for plenary review. But right before the Court was set to hear argument, the Trump administration withdrew the second iteration, and replaced it with the more legally nuanced third version — mooting the appeal and leading the Court to dump the cases from its calendar *without* reaching those merits. (The Court would eventually uphold the third iteration by a 5-4 vote.[67]) As these cases show, the Justices are sometimes making predictions about what they're going to do in cases on which they never actually have a chance to rule. Indeed, the Court was supposed to hear arguments this Term on challenges to President Trump's border wall and his "Remain in Mexico" asylum policy — which no lower court ever sustained. But because the Biden administration changed those policies, the Court removed those cases from its argument calendar, and will likely never reach the merits of those disputes

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impossible to avoid handing down at least *some* emergency rulings during off hours, but those ought to be the exception, rather than the growing norm.

66. *Trump* v. *Int'l Refugee Assistance Proj.*, 137 S. Ct. 2080 (2017) (mem.).

67. *Trump* v. *Hawaii*, 138 S. Ct. 2392 (2018).

notwithstanding its earlier rulings that allowed the policies to go into effect pending appeals of adverse lower-court rulings.

6. Prematurely (and unnecessarily) resolving constitutional questions. The increasing prominence of the shadow docket also means that the Justices are more frequently deciding significant questions of constitutional law at an incredibly early stage of litigation — including in contexts in which such constitutional analyses turn out to be premature and/or entirely unnecessary. Consider, in this respect, the decision in *Roman Catholic Diocese of Brooklyn*, in which a 5-4 majority enjoined New York COVID restrictions that were *no longer in effect* on the ground that they likely violated the First Amendment. Although the dispute certainly appeared to be moot, the majority (in a rare — but unsigned — opinion for the Court) justified such an intervention because "*if*" the state were to re-apply the challenged restrictions on religious worship, such a hypothetical move would "*almost certainly* bar individuals in the affected area from attending services before judicial relief can be obtained."[68] In other words, the Court used a shadow docket ruling to resolve major First Amendment questions about a policy that wasn't even in effect — and did so before the litigation had a chance to make its way through the courts on the merits. The Court is fond of saying that it is "a court of final review and not first view,"[69] trumpeting the virtues of percolation, of developments of factual records, and of the benefit of having several rounds of lower-court briefing (and rulings) in the record before deciding weighty constitutional cases. Except on the shadow docket.

7. Distorting the Supreme Court's workload. In addition to these procedural and substantive concerns, the shadow docket also appears to be increasingly competing with merits cases for the Justices' attention. During its October 2019 Term, the Court handed down signed opinions in only 53 merits cases — the fewest since the Civil War. Some of that can be blamed on COVID, which led the Justices to postpone arguments in 10 cases from the March 2020 and April 2020 sessions to October 2020. But as this Term draws to a close, the Court has handed down signed opinions in only 56 merits cases — which would be the *second*-lowest total since the Civil War. The following chart by Dr. Adam Feldman shows how the Court's merits docket has shrunk — not just right after

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68. *Roman Catholic Diocese of Brooklyn* v. *Cuomo*, 141 S. Ct. 63, 68 (2020) (per curiam) (emphases added).

69. *Zivotofsky ex rel. Zivotofsky* v. *Clinton*, 566 U.S. 189, 201 (2012) (quoting *Adarand Constructors, Inc.* v. *Mineta*, 534 U.S. 103, 110 (2001) (per curiam)). During the October 2018 Term alone, this sentiment was referenced in 11 different opinions. *See* Vladeck, *supra* note 11, at 126–27 n.20.

the 1988 amendments took away most of the Court's remaining mandatory appeals, but increasingly in *recent* years, as well:

Table 2. Total Supreme Court Merits Decisions by Term (1800–Present)

Simply put, as the shadow docket has grown, the merits docket has shrunk. Correlation is not causation, but it's not hard to imagine how the increasing volume of (and attention paid to) these emergency rulings has consumed resources that the Justices, their staffs, and the Court could otherwise have devoted to the merits docket.

8. Undermining the Court's legitimacy. All of the above concerns tie together in respect to the final, and most significant objection: That the rise of the shadow docket, especially at the expense of the merits docket, has negative effects on public perception of the Court — and of the perceived legitimacy of the Justices' work. If the Court is handing down a higher number of decisions affecting Americans in unsigned, unreasoned orders, both in absolute terms and relative to merits rulings, that necessarily exacerbates charges — fair or not — that the Justices are increasingly beholden to the politics of the moment rather than broader jurisprudential principles. As Justice Sotomayor has warned, all of these developments in the aggregate "erode[] the fair and balanced decisionmaking process that this Court must strive to protect."[70]

A common response to these concerns is that those who have raised them are simply overreacting — and that the real problem that critics of the Court's increasingly expansive use of the shadow docket have is disagreement with the

70. *Wolf* v. *Cook County, Ill.*, 140 S. Ct. 681, 684 (2020) (Sotomayor, J., dissenting).

outcomes of these cases.[71] The not-so-subtle insinuation is that progressive critics of the shadow docket are arguing in bad faith — seeking to delegitimize (otherwise legitimate) rulings by the conservative majority.

Leaving aside the obvious point that not all critics of the shadow docket are progressives, what this response truly illustrates is that those offering it don't actually understand the critiques. The concern is not the volume of shadow docket rulings in the abstract. Nor is it that the Justices are granting emergency relief more often. Nor is it that the Justices are more divided when they are doing it. Nor is it that the Justices are deciding significant questions that impact millions of people through these emergency applications. It's that (1) all of this is happening through rulings that are unexplained (or, at least, insufficiently explained); (2) those rulings are inconsistent in how they apply the same procedural standards in ways that certainly *appear* to favor Republican policies (or plaintiffs) over Democratic ones; and (3) the Justices themselves are now insisting that these inconsistent and insufficiently explained rulings have precedential effects. If critics like me were just unhappy with the *results* in these cases, it sure would be odd for us to be encouraging the Justices to provide more *persuasive* rationales to support those results.

More fundamentally, this reaction bespeaks surprising disregard for the notion that procedural regularity matters — and that, as the Supreme Court itself has said, its legitimacy *depends* upon its ability to explain itself:

> The Court's power lies . . . in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands.
>
> The underlying substance of this legitimacy is of course the warrant for the Court's decisions in the Constitution and the lesser sources of legal principle on which the Court draws. That substance is expressed in the Court's opinions, and our contemporary understanding is such that **a decision without principled justification would be no judicial act at all**. . . Thus, the Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation.[72]

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71. *See also* Mark Rienzi, *The Supreme Court's "Shadow" Docket — A Response to Professor Vladeck*, NAT'L REVIEW, Mar. 16, 2021, https://www.nationalreview.com/bench-memos/the-supreme-courts-shadow-docket-a-response-to-professor-vladeck/ (suggesting that my criticism of the Court's shadow docket rulings in religious liberty cases is because "Vladeck or other law professors may not put the ability to attend worship very high in their own values rankings").

72. *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 865–66 (1992) (emphasis added).

This, then, is the true problem with the Court's expanding use of the shadow docket: The *way* it has been used over the past four years raises serious concerns about the Court's legitimacy. That those concerns are not shared by many who think that the Court is reaching the correct bottom-line *results* in these cases speaks as much to their true motivations as it does to these critiques.

IV. SB8 AND THE SHADOW DOCKET

It's against that backdrop that I come, finally, to SB8 — and how it ended up on the shadow docket (and, indeed, is likely to do so again). Because at least one of the other witnesses is situating SB8 in the broader context of ongoing abortion access debates, my focus is on the law itself — and the confusing litigation that it (deliberately) precipitated.

a. SB8

SB8 was enacted by the Texas legislature and signed into law by Governor Greg Abbott in May 2021. As is familiar by now, the law:

> purports to ban all abortions performed on any pregnant person where cardiac activity has been detected in the embryo, with no exceptions for pregnancies that result from rape, sexual abuse, incest, or a fetal defect incompatible with life after birth. S.B. 8 is enforced through a dual private and public enforcement scheme, whereby private citizens are empowered to bring civil lawsuits in state courts against anyone who performs, aids and abets, or intends to participate in a prohibited abortion, and the State may take punitive action against [providers] through existing laws and regulations triggered by a violation of S.B. 8—such as professionally disciplining a physician who performs an abortion banned under S. B. 8.[73]

The shift of enforcement responsibility away from the State of Texas and to private individuals was designed — deliberately — to complicate, if not frustrate, efforts to block SB8 from going into effect, and even from challenging it once it was in effect. Because of a 2001 en banc ruling by the Fifth Circuit,[74] this enforcement structure makes it impossible for private parties to seek injunctive relief against state executive officers — including the Governor, the Attorney General, and so on — as a means of blocking enforcement of the act. SB8 also prohibits providers from recovering costs or fees from plaintiffs who sue them under the statute (even frivolously), meaning that providers bear the

73. *Whole Woman's Health* v. *Jackson*, No. 1:21-cv-616-RP, 2021 WL 3821062, at *2 (W.D. Tex. Aug. 25, 2021).

74. *Okpalobi* v. *Foster*, 244 F.3d 405 (5th Cir. 2001) (en banc).

expense of defending against every case filed under the act even if they win. Finally, it also provides that abortions performed while SB8 is subject to a judicial temporary restraining order or injunction can nevertheless provide a basis for liability if that injunction or restraining order is vacated or reversed on appeal. SB8 was scheduled to go into effect on September 1, 2021.

The way these provisions fit together is in the litigation that they both frustrate and incentivize. To the former, these provisions are designed to cut off pre-enforcement review. Even if there is an appropriate *private* defendant to a suit for pre-enforcement injunctive relief, there is no single defendant against whom an injunction would bar *all* potential enforcement actions. And if providers violate the law once it is in effect and are sued, and seek to invoke *Roe* and *Casey* as a *defense* to the enforcement proceeding, all that the providers would obtain if they succeed is a judgment against the plaintiff who sued them — without *any* opportunity to recover their costs and fees. Nothing would stop an endless flood of copycat lawsuits — even though they would be patently meritless, if not frivolous, once SB8 is held to violate *Casey* — that providers would have to pay to defend against *ad infinitum*. As Professor Tribe and I wrote back in July, if sustained, SB8's novel procedural Catch-22 "would not just make it impossible for anyone to challenge one of the most restrictive abortion laws in the country. It would also set an ominous precedent for turning citizens against one another on whatever contentious issue their state legislature chose to insulate from ordinary constitutional review."[75] This is perhaps the most important thing that can and should be said about the procedural conceit of the law: Whatever one thinks about abortion, the ability of Americans to vindicate their constitutional rights ought not to depend upon the whim of each of the 50 state legislatures. And yet, that's exactly the regime SB8 attempts to create.

Thus far, there have been two major federal lawsuits seeking to strike down SB8 in a manner that would leave it unenforceable going forward (there have also been a number of lawsuits in Texas state court, as well, but they have not generally sought such widespread relief). Chronologically, the second of these is the pending lawsuit by the United States itself, which is scheduled for a hearing before Judge Pitman of the U.S. District Court for the Western District of Texas on the federal government's motion for a preliminary injunction this Friday, October 1.[76]

In the first, the *Whole Woman's Health* case, numerous providers sued eight defendants — including a Texas state court judge and a state court clerk

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75. Laurence H. Tribe & Stephen I. Vladeck, *The Texas Abortion Law Threatens Our Legal System*, N.Y. TIMES, July 22, 2021, at A20.

76. *See United States* v. *Texas*, No. 1:21-cv-796-RP, order at 1 (W.D. Tex. Sept. 15, 2021).

— seeking injunctive relief. The suit named the judge and the clerk as putative representatives of statewide classes of such officials — on the theory that an injunction against a class comprising every state court judge or clerk would be sufficient to block additional enforcement actions.

On Wednesday, August 25, the district court denied the defendants' motion to dismiss based upon various immunity doctrines, and scheduled a preliminary injunction hearing for Monday, August 30.[77] After several of the defendants filed notices of appeal in the Fifth Circuit, they applied for a stay pending appeal — arguing that their appeals divested the district court of the power to even hold a preliminary injunction hearing. On Friday, August 27, the Fifth Circuit (with no explanation) granted an administrative stay, blocking all proceedings in the district court.[78] Although the Court of Appeals ordered the defendants to file responsive briefs by 9:00 a.m. CDT on Tuesday, August 31 (presumably so it could conclusively rule on the stay by the end of the day on August 31), it did not rule on the application until 10 days later, on Friday, September 10 (summarily denying the providers' motion for an injunction pending appeal in the meantime).[79] Thus, it was from the preliminary, administrative stay that the providers sought emergency relief in the Supreme Court on Monday, August 30 — asking Justice Alito (and, through him, the Court) to vacate the Fifth Circuit's administrative stay or to directly enjoin SB8 pending further litigation.

b. SB8 on the Shadow Docket

The first thing to note about the Court's ruling is that it did *not* come in time to prevent SB8 from going into effect. Exactly 11 days earlier in the *MPP* case, Justice Alito had issued an administrative stay to prevent the district court's injunction from going into effect *until* the full Court could rule on the Biden administration's application for a stay pending appeal.[80] Even though the full Court eventually *rejected* that application four days later,[81] Justice Alito as Circuit Justice for the Fifth Circuit still froze the status quo long enough for the

77. *Whole Woman's Health*, 2021 WL 3821062.

78. *Whole Woman's Health* v. *Jackson*, No. 21-50792, 2021 WL 3919252 (5th Cir. Aug. 27, 2021) (per curiam).

79. *See Whole Woman's Health* v. *Jackson*, No. 21-50792, 2021 WL 4128951 (5th Cir. Sept. 10, 2021) (per curiam). Argument in the defendants' appeal in *Jackson* is currently scheduled for the week of December 6, 2021, but the plaintiffs have also sought certiorari "before judgment" from the Supreme Court — asking the Justices to take up the case *before* the Fifth Circuit rules. *See infra* note 98.

80. *Biden* v. *Texas*, No. 21A21, 2021 WL 3702101 (Circuit Justice Alito Aug. 20, 2021) (mem.).

81. *Biden* v. *Texas*, No. 21A21, 2021 WL 3732667 (U.S. Aug. 24, 2021) (mem.).

full Court to reach such a result. No such interim relief was issued in the SB8 case. Instead, midnight CDT on September 1 came and went with no order from the Court — and the most aggressive abortion restrictions since *Roe* was decided went into effect in the nation's second-largest state.[82]

It was only just before midnight the *following* night — at 11:58 p.m. EDT on Wednesday, September 1[83] — that the Supreme Court handed down its ruling. In one long, unsigned paragraph, a 5-4 majority declined both forms of emergency relief sought by the providers. Among other things, the majority noted, the application:

> presents complex and novel antecedent procedural questions on which [the Applicants] have not carried their burden. For example, federal courts enjoy the power to enjoin individuals tasked with enforcing laws, not the laws themselves. And it is unclear whether the named defendants in this lawsuit can or will seek to enforce the Texas law against the applicants in a manner that might permit our intervention. The State has represented that neither it nor its executive employees possess the authority to enforce the Texas law either directly or indirectly. Nor is it clear whether, under existing precedent, this Court can issue an injunction against state judges asked to decide a lawsuit under Texas's law. Finally, the sole private-citizen respondent before us has filed an affidavit stating that he has no present intention to enforce the law.[84]

In other words, the cryptic order justified the Court's refusal to intervene by invoking three variations on the same procedural uncertainty: Whether the named defendants could properly be the subject of the injunction that the providers were seeking. The majority went out of its way to "stress that we do not purport to resolve definitively any jurisdictional or substantive claim in the applicants' lawsuit. In particular, this order is not based on any conclusion about the constitutionality of Texas's law, and in no way limits other procedurally proper challenges to the Texas law, including in Texas state courts."[85]

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82. Justice Sotomayor made this point explicitly in her dissent. *See Whole Woman's Health* v. *Jackson*, No. 21A24, 2021 WL 3910722, at *3 (U.S. Sept. 1, 2021) (Sotomayor, J., dissenting) ("Last night, the Court silently acquiesced in a State's enactment of a law that flouts nearly 50 years of federal precedents. Today, the Court belatedly explains that it declined to grant relief because of procedural complexities of the State's own invention.").

83. The time-stamp is unofficial, and reflects the time-stamp on the e-mail that members of the Supreme Court's press corps received with the ruling.

84. *Id.* at *1 (majority order).

85. *Id.*

Each of the four dissenting Justices wrote a short opinion. Justices Breyer and Sotomayor, in particular, focused on the merits — and on the undeniable hardships that allowing SB8 to go into effect would put on Texans seeking to vindicate their constitutional right to a pre-viability abortion.[86] Chief Justice Roberts, no fan of the Court's abortion jurisprudence,[87] wrote to stress that "the consequences of approving the state action [in insulating the six-week ban from judicial review], both in this particular case and as a model for action in other areas, counsel at least preliminary judicial consideration before the program devised by the State takes effect."[88] But it was Justice Kagan's dissent that most directly contrasted the Court's non-intervention in the SB8 case with its prior shadow docket rulings. She sharply criticized the majority for "barely bother[ing] to explain its conclusion—that a challenge to an obviously unconstitutional abortion regulation backed by a wholly unprecedented enforcement scheme is unlikely to prevail."[89] As she concluded, "[i]n all these ways, the majority's decision is emblematic of too much of this Court's shadow-docket decisionmaking—which every day becomes more unreasoned, inconsistent, and impossible to defend."[90]

c. Four Critiques of the Court's SB8 Ruling

At first blush, the Court's decision to *not* intervene in the SB8 case may seem to avoid some of the pitfalls of its growing use of the shadow docket recounted above. On closer inspection, though, there are at least four serious flaws in how the majority justified its non-intervention — flaws as compared to how the Court *generally* treats such applications, and flaws as compared to how the Court has treated a specific subset of applications over the last Term.

1. Conflating the Standards of Review. First, and most obviously, the majority's cryptic analysis opened by suggesting that the standard for the two forms of relief the providers sought were the same. As it wrote, "[t]o prevail in an application for a stay or an injunction, an applicant must carry the burden of making a 'strong showing' that it is 'likely to succeed on the merits,' that it will be 'irreparably injured absent a stay,' that the balance of the equities favors it, and that a stay is consistent with the public interest."[91] But that's the standard

86. *Id.* at *2–3 (Breyer, J., dissenting); *id.* at *3–5 (Sotomayor, J., dissenting).

87. *See, e.g.*, *June Medical Servs. L.L.C.* v. *Russo*, 140 S. Ct. 2103, 2133 (2020) (Roberts, C.J., concurring in the judgment) ("I joined the dissent in *Whole Woman's Health* [v. *Hellerstedt*, 136 S. Ct. 2292 (2016),] and continue to believe that the case was wrongly decided.").

88. *Whole Woman's Health*, 2021 WL 3910722, at *2 (Roberts, C.J., dissenting).

89. *Id.* at *5 (Kagan, J., dissenting).

90. *Id.*

91. *Id.* at *1 (majority order).

for a stay (or to vacate a stay). The standard for an emergency writ of injunction focuses instead on whether the substantive right at issue is "indisputably clear," and the case presents "critical and exigent circumstances" justifying such relief.[92] It's usually understood that the burden for an injunction is *higher*, but it's also asking a different question — focusing on the underlying right at issue rather than the impact of the lower-court's rulings. By invoking only the stay standard, the majority thereby elided over the subtle but significant distinctions between the two forms of relief.

2. Ignoring the Equities. In focusing entirely on the unsettled question of whether the defendants were properly subject to injunctive relief, the Court's analysis entirely ignored the extent to which the *other* parts of the traditional four-factor stay analysis weighed *overwhelmingly* in favor of relief. The providers undoubtedly had demonstrated an irreparable injury; the public interest clearly supported a stay given the implications; and there could be no doubt that the providers had made a "strong showing" that SB8 was unconstitutional under *Roe* and *Casey*. Given the stakes, it would have behooved the majority to explain why the procedural uncertainty *outweighed* the serious and substantial arguments in *support* of vacating the Fifth Circuit's administrative stay — at least largely because it's hard to imagine how such an explanation could have been convincing. Instead, the majority simply omitted the rest of the (necessarily countervailing) analysis.

3. Relying on Procedural Questions — Not Procedural Obstacles. Relatedly, the majority relied not on procedural *obstacles* to the relief the providers were seeking, but merely on the fact that granting such relief would require courts to answer unsettled procedural *questions*. It would be one thing if the majority's analysis *held* that, in fact, the defendants were *not* properly subject to suit. But it expressly disclaimed doing so.[93] Given that the stay analysis, again, requires only a "strong showing" of likelihood of success on the merits, and not an irrefutable one, the Court's refusal to actually resolve whether the procedural issue was *actually* an obstacle is hard to justify.

4. Not Explaining Inconsistency With Prior Shadow Docket Rulings. I have saved what, in my view, is the biggest problem with the Supreme Court's SB8 ruling for last: the stark contrast between the Court's reliance upon unsettled procedural questions to justify not intervening in the SB8 case, and its flat-out disregard for procedural *obstacles* — not just procedural *questions* —

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92. *See, e.g.*, *Ohio Citizens for Responsible Energy, Inc.* v. *Nuclear Regulatory Comm'n*, 479 U.S. 1312, 1312 (Circuit Justice Scalia 1986).

93. *Whole Woman's Health*, 2021 WL 3910722, at *1 ("[W]e stress that we do not purport to resolve definitively any jurisdictional or substantive claim in the applicants' lawsuit.").

in at least three of the emergency injunctions it had issued in the preceding nine months. In *Roman Catholic Diocese* and *Agudath Israel*, for instance, the same 5-4 majority issued emergency writs of injunction to block New York COVID restrictions that were *no longer in effect* — on the ground that the restrictions violated the Free Exercise Clause of the First Amendment (as incorporated against the states).[94] The unsigned majority opinion in *Roman Catholic Diocese* briefly explained *why* the Court was issuing an injunction against an order that was not then in effect,[95] but never grappled with whether the prudential mootness of the dispute presented a procedural obstacle to the substantive relief the applicants sought.

Worse still, in *Tandon* — the April ruling blocking California's restrictions on in-home gatherings, also on religious liberty grounds — the same 5-4 majority blew right past a statutory procedural bar when it made new law under the Free Exercise Clause.[96] For generations, the Court had interpreted its authority to issue emergency writs of injunction under the All Writs Act as being confined to cases in which the rights at issue were "indisputably clear."[97] It is axiomatic, or at least it should have been, that no such relief can issue when, as in *Tandon*, it's based upon a *new* interpretation of the Constitution. Against the backdrop of *Roman Catholic Diocese*, *Agudath Israel*, and *Tandon*, all of which produced the same 5-4 division, the majority's refusal to intervene in the SB8 case is hard to fathom. As I wrote shortly after the SB8 ruling, given the procedural roadblocks in the earlier cases, "if the court was justified in intervening in April to protect a new understanding of constitutional rights, it was surely justified in intervening Wednesday to protect an old one."[98]

In all, then, the central problem with the SB8 ruling was not the Supreme Court's refusal to intervene in the abstract; it was its refusal to intervene, *without* resolving the identified (and intentionally created) procedural issues, in a context in which it had simply *ignored* concrete procedural obstacles to grant emergency relief at least three times already in the same Term. If the Court had, consistent with what had been true historically, only intervened on the

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94. *Roman Catholic Diocese* v. *Cuomo*, 141 S. Ct. 63 (2020) (per curiam); *see also Agudath Israel of Am.* v. *Cuomo*, 141 S. Ct. 889 (2020) (mem.).

95. *Roman Catholic Diocese*, 141 S. Ct. at 68 ("[I]njunctive relief is still called for because the applicants remain under a constant threat that the area in question *will be reclassified* as red or orange." (emphasis added)).

96. *Tandon* v. *Newsom*, 141 S. Ct. 1294 (2021) (per curiam).

97. *See supra* note 90 and accompanying text.

98. Steve Vladeck, *The Supreme Court Doesn't Just Abuse Its Shadow Docket. It Does So Inconsistently*, WASH. POST, Sept. 3, 2021, https://www.washingtonpost.com/outlook/2021/09/03/shadow-docket-elena-kagan-abortion/.

shadow docket in rare and non-contentious circumstances, the non-intervention in the SB8 case might be more defensible. Here, in contrast, the Court's differential treatment leaves the impression that the same five Justices were willing to bypass procedural roadblocks on the shadow docket to expand religious liberty, but relied upon open procedural questions that they wouldn't resolve to justify *not* protecting a clearly established constitutional right. The intervention the providers were seeking might still not have been *enough* (after all, an injunction against the named defendants would probably *not* have barred all SB8 suits). But that doesn't change the fact that the relief the providers were seeking was clearly within both the Court's formal power and what had increasingly become the norms of the Court's recent practice. And if there *were* plausible grounds on which to differentiate the Court's interventions in the New York and California cases and its non-intervention in the Texas case, it sure would have behooved the majority to say what they were.

d. Ongoing SB8 Litigation

To be sure, the shadow docket may not be done with SB8. The providers in the *Whole Woman's Health* case have already asked the Court to grant certiorari "before judgment" in their lawsuit to resolve the procedural issues that doomed their application for emergency relief — and have asked the Court to expedite its consideration of whether to do so.[99] And however Judge Pitman rules on the federal government's pending motion for a preliminary injunction in *United States* v. *Texas*, it's not at all hard to imagine that whoever he rules *against* will seek immediate, emergency relief from the Fifth Circuit — and whoever loses *that* dispute in the Fifth Circuit will seek immediate, emergency relief from the Supreme Court. Thus, it is distinctly possible — if not likely — that SB8 will be back before the Justices even *before* they are scheduled to hear oral argument on December 1 in *Dobbs* v. *Jackson Women's Health Organization*, the Mississippi case in which the state and numerous of its supporting *amici curiae* have asked the Court to formally overrule *Roe* and *Casey*.[100] After all, there is at least some universe in which the Court could uphold the Mississippi law without formally overruling *Roe* and *Casey* (even if such a holding would require narrowing them substantially). But there is no universe in which SB8's substantive restrictions and *Roe* and *Casey* can coexist. That is, after all, the whole point.

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99. Motion to Expedite Consideration of the Petition for a Writ of Certiorari Before Judgment and to Expedite Consideration of this Motion, *Whole Woman's Health* v. *Jackson*, No. 21M__ (U.S. filed Sept. 23, 2021), https://s3.documentcloud.org/documents/21068354/wwh-v-jackson-motion-to-expedite-1.pdf.

100. *Dobbs* v. *Jackson Women's Health Org.*, No. 19-1392 (U.S. to be argued Dec. 1, 2021).

Regardless of which vehicle allows for it, the key so long as *Roe* and *Casey* remain good law is for courts to provide some kind of permanent injunctive relief that bars not just individual plaintiffs from suing providers under SB8, but that bars SB8 lawsuits *altogether*. Until and unless that happens, it is hard to imagine that there will be widespread provision of abortions in violation of SB8 in Texas — even if there are a few. Of course, every day that passes *without* such relief is another day in which millions of Americans are deprived of their constitutional rights. So even if SB8 *is* ultimately blocked in a manner in which it cannot be enforced, it still will have caused not just harm, but *irreparable* harm to hundreds — if not thousands — of individuals who were unable to obtain an abortion in Texas while SB8 was in force, and for whom it is too late to obtain an abortion even when future SB8 suits are blocked. Again, whatever one thinks about the constitutional right to obtain a pre-viability abortion, allowing this procedural Rube Goldberg device to succeed sets a terrible precedent for the ability of courts to protect *all* constitutional rights going forward.

V. POTENTIAL AVENUES FOR REFORM

In that respect, the Supreme Court's handling of the SB8 case underscores the need for two very different sets of reforms: Reforms to make it harder (if not impossible) for states to copy SB8's devious procedural traps in future legislation on *any* subject, including abortion; and more general reforms to the shadow docket. I address these each in turn.

a. SB8-Inspired Reforms

Taking SB8 first, it seems to me uncontroversial to suggest that Congress should make it harder for *any* state to adopt this kind of procedural contraption to frustrate the enforcement of constitutional rights. One possible means of doing so is reflected in section 8 of the Women's Health Protection Act of 2021,[101] which the House of Representatives passed last Friday. That provision not only creates an express cause of action for those aggrieved by laws such as SB8 against any state official (or private official authorized by the state) responsible for enforcing state abortion restrictions, but it expressly abrogates a state's sovereign immunity in such cases — a move that is well within Congress's constitutional authority under Section 5 of the Fourteenth Amendment to enforce Section 1 of the Fourteenth Amendment.[102]

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101. H.R. 3755, 117th Cong. § 8 (2021), https://www.congress.gov/117/bills/hr3755/BILLS-117hr3755eh.pdf.

102. *See Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976) (holding that statutes enacted pursuant to Congress's power to enforce the Fourteenth Amendment may constitutionally abrogate the sovereign immunity of non-consenting states).

If anything, Congress might consider a version of section 8 that would more broadly allow such litigation *anytime* that a state transfers enforcement responsibility to private citizens of a law to which there are colorable federal constitutional objections — including codifying what has already been true as a practical matter, *i.e.*, that the federal government is a proper party to bring such cases. And insofar as judicial immunity is a common law doctrine and not a constitutional command, Congress might also consider legislation that more precisely identifies when injunctive relief against state court judges is and is not appropriate — in light of the lessons learned from the litigation thus far. Of course, this dovetails with what, to me, are far more fundamental reforms that Congress should pursue to make enforcement of constitutional rights easier *across the board*, but that's for another time.

b. Shadow Docket Reforms

As I've suggested above, the Supreme Court's (first) shadow docket ruling in the SB8 case drives home a series of *broader* problems with the Court's growing use (and, in some cases, abuse) of these kinds of rulings in recent years. In that respect, reform of the shadow docket strikes me as being about so much *more* than just as a reaction to the Court's September 1 ruling.

Moreover, just as the rise of the shadow docket has largely been the result of judge-made shifts in judge-made norms and procedures, the first place where reforms to address these concerns should be pursued is at the Supreme Court itself. Hopefully, the mere fact that the Committee is considering this topic as part of a broader reform conversation will bring additional light to the concerns I and others have raised — and perhaps the Justices will take those into account as they approach shadow docket rulings going forward. Among other reforms that the Court could adopt, whether formally or informally, *without* an Act of Congress, it might include:

- Reviving the practice of having individual Circuit Justices (rather than the full Court) resolve even contentious emergency applications whenever and wherever possible (including, where appropriate, holding in-chambers oral argument).
- Formally publishing any order by an individual Circuit Justice denying an application, whether or not it is accompanied by an opinion.[103]

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103. Although in-chambers *opinions* are published today as a matter of course, even *that* wasn't always so. *See* Cynthia Rapp, *Introduction*, *in* 1 RAPP v (2001). Still today, in-chambers *orders* denying applications for emergency relief are *not* usually reported in either the *Supreme Court Reporter* or the *U.S. Reports*; they can be found online only by searching the docket listing for the specific case (so that one cannot search for cases they don't already know about). *See, e.g.*, *Rumsfeld* v. *Rell*, No. 05A231 (Ginsburg, Circuit Justice Sept. 8, 2005)

- Amending the Court's formal rules and informal norms to provide far clearer guidelines for the procedures and timing of emergency applications (at least in non-capital cases), including the rules governing *amicus* participation and the possibility of oral argument before either the full Court or the Circuit Justice.
- Committing, at least informally, to publishing a rationale (and publicly identifying the concurring and dissenting Justices) for (1) any order that grants an application for emergency relief; (2) any order (other than a denial of certiorari) from which a Justice publicly dissents; or (3) any other order that the Justices intend to have precedential effect in the lower courts.
- Tying any order granting emergency relief to a specific statutory authority — and, where possible, articulating why the relevant standard for such relief has been satisfied.
- Committing to scheduled releases of orders on emergency applications except where circumstances prohibit it (as in last-minute execution-related litigation), and to provide advance public notice of order issuance wherever possible.
- Treating applications for emergency relief on novel and important questions of federal law as petitions for certiorari — and adding the case to the merits docket for plenary review at the same time as the Court rules on the emergency application.[104]

I should also note that I'm one of those who is generally opposed to undue congressional interference in the workings of the federal courts in general, and the Supreme Court in particular. To that end, I don't think that the concerns that I and others have identified can or should be addressed through reforms designed to *prohibit* the Court from doing what it's doing — or, for example, to mandate that the Justices publicly disclose their votes on all (or even some) orders, etc. For starters, the problem is not the shadow docket *itself*; for as long as we have a Court the jurisdiction of which extends to emergency applications, *some* action on the shadow docket is inevitable. What's more, even if such legislation doesn't raise constitutional concerns (and some of it might), I fear

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(mem.). My thanks to Professor Ed Hartnett for pointing out that in-chambers orders *granting* emergency relief *are* published as orders by the full Court.

104. Just one week after the SB8 ruling, the Court did exactly that — granting a stay, granting certiorari, and expediting plenary merits review of a Texas death-row inmate's claims. *See Ramirez* v. *Collier*, No. 21A33, 2021 WL 4077814 (U.S. Sept. 8, 2021) (mem.).

that it could open up a can of worms that could lead to intrusions on norms of judicial independence going forward.

That's not to say, however, that Congress is (or would be) entirely powerless to address the rise of the shadow docket. Rather, I think that there's a meaningful conversation to be had about shadow-docket inspired legislative reforms, which I see as falling into two basic camps:

First, Congress can and should consider mechanisms for taking pressure *off* of the shadow docket. If the rise of the shadow docket is in part a reaction to external catalysts, Congress can, of course, address them. Among other things, such reforms might include:

- Allowing the federal government to transfer all civil suits seeking "nationwide" injunctive relief to the D.C. district court — to avoid the concern of overlapping (or diverging) "nationwide" injunctions.
- In cases in which *any* (state or federal) government action is enjoined by a lower federal court, speed up the appellate timelines so that appeals of lower-court rulings receive plenary review much faster — by shortening the time for filing an appeal; by mandating aggressive briefing schedules; and by strongly encouraging courts to give such cases all due priority.
- In capital cases (where Justices from across the spectrum have bemoaned the difficulty of confronting novel legal questions on the literal eve of a scheduled execution), give the Court *mandatory* appellate jurisdiction at least over direct appeals — and make it easier for prisoners to bring method-of-execution challenges *before* an execution date has been set.

Second, Congress might consider codifying certain features of the shadow docket that were only norms historically. These could include:

- Codifying the traditional four-factor test that the Court applies in considering applications for emergency relief.[105]
- Encouraging the Justices to provide at least a brief explanation of any order that grants any type of emergency relief.
- Encouraging the Court to hold arguments on applications where there is at least a reasonable likelihood that the Justices will grant relief.[106]

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105. Congress has previously prescribed standards of review even for injunctions against unconstitutional governmental action. *E.g.*, *Miller* v. *French*, 530 U.S. 327 (2000) (upholding provision of the Prison Litigation Reform Act that prescribes a standard of review courts must apply to grant injunctions to remedy unconstitutional prison conditions).

106. Indeed, the Court's shift to conducting remote oral arguments via telephone in merits cases from May 2020 through May 2021 reinforces the possibility that similar remote arguments could be staged in the future for suitable emergency applications, as well.

- Requiring (or, at least, encouraging) applications to be resolved in the first instance by the Circuit Justice *without* referral to the full Court.

VI. CONCLUSION

I harbor no illusion that these reform ideas are either unique or exhaustive. But they do circle around a broader proposition of more general relevance to this Committee: The overwhelming majority of orders that the Supreme Court hands down through the shadow docket are exercises of the Court's constitutional *appellate* jurisdiction — not its original jurisdiction. As such, it is subject to "such exceptions[] and . . . such regulations as the Congress shall make."[107] Even for those, like me, who believe that Congress's power under the Exceptions Clause is not plenary,[108] Congress still has significant and substantial leeway and latitude to regulate the Court's appellate docket.

And that is the broader point on which I'd like to close my testimony today: It has been over 33 years since the last time that Congress passed legislation generally regulating the Supreme Court's docket. That legislation, as the Committee well knows, eliminated almost all of the Court's remaining "mandatory" appellate jurisdiction — so that, except for the handful of original cases and appeals from three-judge district courts that the Justices receive each year, the Court would have complete control over its docket.[109]

If nothing else, the rise of the shadow docket and the decline of the merits docket, as powerfully reflected in the SB8 litigation, should at the very least provoke this Committee to ask whether Congress went too far in 1988 — and whether, across an array of topics, it's time for Congress to re-assert some modicum of control over the *entire* docket of the highest court in the land, both procedurally and substantively. I just hope that any conversation along those lines *includes* the shadow docket, because regardless of any reforms that the Committee considers, bringing this increasingly important source of significant Supreme Court rulings out of the shadows is an important step unto itself.

Thank you again for the invitation to testify today. I look forward to your questions.

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107. U.S. CONST. art. III, § 2, cl. 2.

108. *See Felker* v. *Turpin*, 518 U.S. 651, 667 (1996) (Souter, J., concurring).

109. *See* Act of June 27, 1988, Pub. L. No. 100-352, 102 Stat. 662 (codified in scattered sections of 2, 7, 22, 25, 28, 33, 43, and 45 U.S.C.).

Senator Dick Durbin
Chair, Senate Judiciary Committee
Written Questions for Representative Donna Howard
October 6, 2021

1. At the hearing last week, there were several occasions where you were asked questions but were not given the opportunity to fully respond.

   If you would like, please take this opportunity to further respond to the questions raised and issues discussed at the hearing.

Written Questions for the Record from the Senate Committee on the Judiciary for the Hearing: "Texas's Unconstitutional Abortion Ban and the Role of the Shadow Docket" September 29, 2021

Fatima Goss Graves

Senator Durbin Question:

1. You noted in your testimony and in your responses to questions that state legislatures continue to pass severe restrictions on abortion. As we have seen in Texas with S.B. 8, one of the most restrictive laws in the country, the effects on women's rights and access to reproductive care have been devastating.

   Why is having access to quality reproductive care important for women to participate fully in our economy and our society?

The Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization* has been devastating for abortion access across the country. Multiple states have enacted or are enforcing total bans on abortion affecting millions across the country.[1] The decision has wreaked legal and public health chaos, even as the full extent of the harm has yet to be realized. As studies and people's real-life experiences have demonstrated, being forced to continue a pregnancy jeopardizes people's health and results in substantial economic, educational, and professional burdens. Such consequences are particularly detrimental to those who work in low-paid jobs or live in poverty, who are disproportionately people of color.

Access to abortion has enabled people to invest more in their human capital and careers, enabling women to complete high school and higher levels of education, improve their labor force participation, and secure their economic independence.[2] After legalization of abortion permitted greater access to the care in the 1970s, women—particularly Black women—experienced significant increases in school graduation and employment rates.[3] Research shows that when women are able to obtain an abortion, they are less likely to experience economic hardship and insecurity than those who are denied an abortion.[4] Compared to women who obtained abortion care, those who were denied such care and subsequently gave birth were nearly four times more likely to live below the federal poverty line[5] and the majority reported that five years later, they

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[1] NPWF, STATE ABORTION BANS COULD HARM NEARLY 15 MILLION WOMEN OF COLOR (July 2022), https://www.nationalpartnership.org/our-work/economic-justice/reports/state-abortion-bans-harm-woc.html?utm_source=other&utm_medium=other&utm_campaign=hj_dobbs; CENTER FOR REPRODUCTIVE RIGHTS, WHAT IF ROE FELL? https://reproductiverights.org/maps/what-if-roe-fell/.

[2] Anna Bernstein & Kelly M. Jones, Ctr. on The Econ. of Reprod. Health, The Economic Effects of Abortion Access: A Review of the Evidence (2019), https://iwpr.org/wp-content/ uploads/2020/07/B379_Abortion-Access_rfinal.pdf.

[3] *Id.*

[4] Diana Greene Foster et al., Socioeconomic Outcomes of Women Who Receive and Women Who Are Denied Wanted Abortions in the United States, 108 AM. J. PUB. HEALTH 407, 412 (2018).

[5] Kate Gibson, *Women Denied Abortions Live in Financial Distress Years Later, Study Finds*, CBS NEWS, (Jan. 20, 2020, 8:35 AM), https://www.cbsnews.com/news/women-denied-abortions-in-financial-distress-years-later-study-finds/.

were still not able to pay for basic expenses like housing, transportation, and food.[6] Women living in states with greater access to reproductive health services such as Medicaid coverage of abortion have been found to have higher median wages, more likely to be managers, and less likely to work part-time jobs.[7]

In short, abortion restrictions limit women's future educational and employment opportunities and thereby deny their ability "to participate equally" in society, reinforcing sex stereotypes about the role of women in society.[8]

Senator Kennedy Questions:

1. You were a witness in front of the House Committee on Oversight and Reform on November 14, 2019. The Hearing was entitled "Examining State Efforts to Undermine Access to Reproductive Health Care." You said in your written testimony the following statement: "[L]egislators passing restrictions on abortion want to control the lives and futures of women, denying them equality."

    - Do you still believe this statement that legislators passing restrictions on abortion want to control the lives and futures of women, denying them equality, is true?

Women can't be truly equal if they don't have control over their own bodies and reproductive lives, including the decision about whether to have an abortion. The right to control one's body, and by extension, one's destiny, is central to the principles of equality guaranteed by the Constitution. This is a fact demonstrated by decades of evidence and people's own lived experiences, and it is something that the general public understands. According to a recent poll, of the six in 10 voters who want abortion legal in all or most cases, overwhelming majorities said the Supreme Court's *Dobbs* decision raised a host of concerns, including the loss of women's rights (86%) and men wanting to control women (77%).

    - What objective evidence, other than any subjective inferences, did and do you have that it is the desire of such legislators to control the lives of women?

In the decade before *Roe v. Wade* was overturned, lawmakers passed more than 500 abortion restrictions. The impact of those restrictions was evident – extensive research and the real-life experiences of pregnant people and families make clear that abortion restrictions and bans hurt

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[6] *Id.*
[7] Kate Bahn et al., Ctr. For Am. Progress, Linking Reproductive Health Care Access to Labor Market Opportunities For Women 13-17, 18 (2017), https://cdn.Americanprogress.org/content/uploads/2017/11/16060404/110817_ReproRightsEconOpportunity-report1.pdf?_ga=2.84593433. 1649302871.1631567668-707221933.1627661740.
[8] *Planned Parenthood v. Casey*, 505 U.S. 833, 856 (1992).

women.[9] Legislators know about these impacts, but they are moving forward with abortion bans, resting on and perpetuating outmoded assumptions about the proper role of women in society. Abortion bans and restrictions limit women's autonomy and dignity as a class by retreating to the now-proscribed notion that "the female [is] destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas."[10]

Stereotypes relegating women to the role of "mothers or mothers-to-be" but "presuming a lack of domestic responsibilities for men" are "mutually reinforcing" and "create[ ] a self-fulfilling cycle of discrimination that force[s] women to continue to assume the role of primary family caregiver."[11] Just recently, on the same day that the West Virginia legislature passed a near-total ban on abortion, the West Virginia House of Representatives passed an accompanying resolution that included a specific discussion about women's role in society. The Resolution extolled motherhood as the "most profound and important vocation."[12] It described the impact of abortion rights as a ploy "to devalue motherhood into a mere option, without privilege or special importance."[13] Inherent in this resolution, and the abortion ban, is stereotyping of women and overbroad generalizations about the sexes, along with a distrust of women's ability to control their lives and make decisions about their bodies. The resolution reflects the legislators' desire to decide for women that their most valuable role in society is to be mothers, unlike men who can decide for themselves what role or roles they will play.

- What objective evidence, other than any subjective inferences, did and do you have that it is the desire of such legislators to deny women equality?

The research on the impact of abortion bans and restrictions is clear – women's ability to participate equally in society is directly tied to their ability to control their reproductive lives. The right to control one's body, to determine when and whether you are pregnant, is central to the principles of equality guaranteed by the Constitution. As early as 1891, the Supreme Court held that "[n]o right is held more sacred, or is more carefully guarded by the common law, than

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[9] *See, e.g.*, Diana Greene Foster et al., *The Turnaway Study*, https://www.ansirh.org/research/ongoing/turnaway-study; Anna Bernstein & Kelly M. Jones, Ctr. On The Econ. Of Reprod. Health, The Economic Effects of Abortion Access: A Review of the Evidence (2019), https://iwpr.org/wp-content/ uploads/2020/07/B379_Abortion-Access_rfinal.pdf; Diana Greene Foster et al., *Socioeconomic Outcomes of Women Who Receive and Women Who Are Denied Wanted Abortions in the United States*, 108 AM. J. PUB. HEALTH 407 (2018); Kate Bahn et al., Ctr. For Am. Progress, Linking Reproductive Health Care Access To Labor Market Opportunities For Women 13 (2017), https://cdn.Americanprogress.org/content/uploads/2017/11/16060404/110817_ReproRightsEconOpportunity-report1.pdf?_ga=2.84593433. 1649302871.1631567668-707221933.1627661740; Adam Sonfield et al., GUTTMACHER INST., The Social And Economic Benefits Of Women's Ability To Determine Whether And When To Have Children 24 (2013), https://www.guttmacher.org/sites/default/files/report_pdf/socialeconomic-benefits.pdf.

[10] *Stanton v. Stanton*, 421 U.S. 7, 14–15 (1975).

[11] *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 736 (2003).

[12] H.R. Res. 302, 85th Leg., 2nd Sess. (W.V. 2022) http://www.wvlegislature.gov/Bill_Status/bills_text.cfm?billdoc=HR302+intr.htm&yr=2022&sesstype=3X&i=302&houseorig=h&billtype=r&fbclid=IwAR2QZJpE8SqzfSdyWZJZ1jkd6n98UEdT7xbp6wyyz4OELjLWBEotUGeiXU0.

[13] *Id.*

the right of every individual to the possession and control of his own person, free from all restraint or interference of others"[14] And for over seventy years, the Supreme Court recognized that people's decisions about their bodies, including whether and when to have children, are among "the most intimate and personal choices a person may make in a lifetime," and thus central to the concepts of autonomy, liberty, and equality.[15]

As mentioned above, pregnant women who are able to get the abortion care they seek are less likely to experience economic hardship and insecurity than those women who are denied abortion care.[16] Forty percent of women cite financial concerns as a reason for an abortion, and nearly 30% cite the need to focus on parenting existing children.[17] Childbirth expenses alone can reach tens of thousands of dollars,[18] and pregnant people without health insurance (disproportionately women of color)[19] may bear these costs in their entirety. The total costs of raising a child are substantial, accounting for on average 27% of low-income families' gross income.[20] For a pregnant person who already has children, raising additional children means fewer resources for each child's needs.[21]

Pregnant workers also face workplace discrimination based on their pregnancy and based on gender stereotypes, such as the stereotype that mothers are less competent and committed to their jobs.[22] Over 26,600 pregnancy discrimination charges were filed with the Equal Employment Opportunity Commission and state-level agencies between 2012 and 2016.[23] Pregnant workers often have requests for reasonable accommodation denied and are then fired, forced to quit, or

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[14] *Union Pacific R. Co. v. Botsford*, 141 U. S. 250, 251 (1891).
[15] *Casey*, 505 U.S. at 851; *see also Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).
[16] Diana Greene Foster et al., Socioeconomic Outcomes of Women Who Receive and Women Who Are Denied Wanted Abortions in the United States, 108 AM. J. PUB. HEALTH 407, 412 (2018).
[17] M. Antonia Biggs et al., *Understanding Why Women Seek Abortions in the US*, BMC Women's Health, July 2013, at 5-6.
[18] *See* Truven Health Analytics, The Cost of Having a Baby In The United States 6 (2013), https://www.Nationalpartnership.org/our-work/resources/health-care/maternity/ archive/the-cost-of-having-a-baby-in-the-us.pdf.
[19] Nat'l P'ship For Women & Famus., Despite Significant Gains, Women of Color Have Lower Rates Of Health Insurance Than White Women 1-2 (2019), https://www. nationalpartnership.org/our-work/resources/health-care/womenof-color-have-lower-rates-of-health-insurance-than-whitewomen.pdf.
[20] Mark Lino et al., U.S. Dep't of Agric., Expenditures on Children By Families, 2015, at 15 (2017), https://fnsprod.azureedge.net/sites/default/files/crc2015_March2017_0.pdf.
[21] *See, e.g.*, Adam Sonfield et al., Guttmacher Inst., The Social And Economic Benefits Of Women's Ability To Determine Whether And When To Have Children 24 (2013). https://www.guttmacher.org/sites/default/files/report_pdf/socialeconomic-benefits.pdf.
[22] *See* U.S. Equal Emp. Opportunity Comm'n, EEOC-CVG-2015- 1, Enforcement Guidance on Pregnancy Discrimination And Related Issues (2015), https://www.Eeoc.gov/laws/guidance/enforcement-guidance-pregnancydiscrimination-and-related-issues; Stephen Benard et al., *Cognitive Bias and the Motherhood Penalty*, 59 HASTINGS L.J. 1359, 1369-72 (2008).
[23] Carly Mccann & Donald Tomaskovic-Devey, Ctr. For Emp. Equity, Univ. Of Mass. Amherst, Pregnancy Discrimination at Work: An Analysis of Pregnancy Discrimination Charges Filed With The U.S. Equal Employment Opportunity Commission 2 (2021), https://www.umass.edu/employment equity/sites/default/files/Pregnancy%20Discrimination%20at% 20Work.pdf.

pushed into unpaid leave.[24] Women of color and immigrant women, particularly Black and Latin women, are at greater risk given their overrepresentation in jobs where pregnancy accommodations are often denied, such as retail, food services, and health care jobs.[25] Black and Latinx pregnant workers are also more likely to have physically demanding jobs, which carry an increased risk of preterm delivery and low birth weight, both of which can be associated with life-long health conditions for the child.[26] Pregnant women have lower employment rates than nonpregnant women,[27] and may also face disparate terms and conditions of employment, unequal access to benefits, interference with promotions, or harassment.[28] Additionally, having a child often then further limits an individual's ability to continue working and advance professionally. Mothers and pregnant people can face a "maternal wall" of bias and discrimination in the workplace.[29] They are less likely to be hired, promoted, or trained for management positions and may be viewed as less competent and committed to their work.[30]

Finally, our country is in a brutal – and preventable – maternal mortality crisis, disproportionately impacting Black and Native women. Implicit bias, poverty, and lack of access to health care all contribute to this crisis.[31] A recent study found that more than 80% of maternal deaths in the United States were preventable.[32] Individuals should have the power to control their body and destiny, particularly given the life-long, and potentially life-ending, ramifications of a

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[24] *See* Nat'l Women's L. Ctr. (NWLC), The Pregnant Workers Fairness Act: Making Room for Pregnancy on The Job 1 (2021), https://nwlc.org/wpcontent/uploads/2021/02/PWFA-Making-Room-for-Pregnancyv4.2-2021.pdf.

[25] *See* Nat'l Latina Inst. for Reprod. Health & NWLC, Accommodating Pregnancy on The Job: The Stakes For Women Of Color And Immigrant Women 1 (2014), http://nwlc.org/sites/default/files/pdfs/the_stakes_for_woc_final. pdf.

[26] Jasmine Tucker, Sarah Javaid, Sarah David Heydemann, Nat'l Women's L. Ctr., Pregnant Workers Need Accommodations for Safe and Healthy Workplaces 1 (Oct. 2021), https://nwlc.org/wp-content/uploads/2021/11/Pregnant-Workers-by-the-Numbers-2021-v4.pdf.

[27] Jennifer Bennett Shinall, *The Pregnancy Penalty*, 103 MINN. L. REV. 749, 752 (2018). Bennett Shinall clarifies that "[a]fter all other underlying differences between pregnant and nonpregnant women are taken into account, pregnant women are 4.2 percentage points less likely to be employed than nonpregnant women. This gap in employment outcomes—a gap that cannot be explained by voluntary choice, demographics, or educational characteristics—is the pregnancy penalty." *See id.*

[28] *See* Mccann & Tomaskovic-Devey, *supra* note 25, at 15-17; EEOC, *supra* note 24; Dina Bakst et al., A Better Balance, Long Overdue: It Is Time For The Federal Pregnant Workers Fairness Act 13-16 (2019), https://www.abetterbalance.org/wp-content/uploads/2019/05/LongOverdue.pdf; April J. Anderson, Cong. Rsch. Serv., R46821, Pregnancy And Labor: An Overview Of Federal Laws Protecting Pregnant Workers 12-15 (2021), https://crsreports.congress.gov/product/pdf/R/R46821.

[29] *See, e.g.*, Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 HARV. WOMEN'S L.J. 77, 77- 78, 90-101 (2003).

[30] *See, e.g.*, Shelley J. Correll et al., *Getting a Job: Is There a Motherhood Penalty?*, 112 AM. J. SOCIO. 1297, 1316, 1330 (2007).

[31] Michael Ollove, *A Shocking Number of U.S. Women still Die of Childbirth. California is Doing Something About That.*, WASH. POST (Nov. 4, 2018, 12:00 PM), https://www.washingtonpost.com/national/health-science/a-shocking-number-of-us-women-still-die-from-childbirth-california-is-doing-something-about-that/2018/11/02/11042036-d7af-11e8-a10f-b51546b10756_story.html; Bani Saluja & Zenobia Bryant, *How Implicit Bias Contributes to Racial Disparities in Maternal Morbidity and Mortality in the United States*, J. WOMEN'S HEALTH 270 (2021), https://doi.org/10.1089/jwh.2020.8874.

[32] Press Release, Center for Disease Control and Prevention, Four in 5 Pregnancy-Related Deaths in the U.S. are Preventable, (Sept. 19, 2022) https://www.cdc.gov/media/releases/2022/p0919-pregnancy-related-deaths.html.

pregnancy. The decision to remain pregnant belongs to no one other than the person carrying that pregnancy.

None of these points of data, reflections of lived experience, and impact of bans is secret. Legislators know about the impacts of being denied bodily autonomy with such profound life-long consequences. Legislators know of the emotional toll abortion bans are having on individuals across the country as they are forced to contend with a gutting of health care access that is central to their future, dignity, and equality. Moreover, when legislating these abortion restrictions, lawmakers know they fall disproportionately on women. It is women who bear the brunt of the fear and real harm these laws inflict. It is women who lawmakers seek to control the roles they should play in society. These laws target women. The intent of lawmakers to make women less under the eyes of the law could not be clearer.

- This congress I introduced S. 86, the "Prenatal Nondiscriminatory Act" or "PRENDA." The bill would make it a crime to abort a child based on his or her gender. Generally, do you support legislation banning an abortion if it is sought because of the gender of the child?

I trust individuals to make the right health care decision for themselves and their families. Throughout a pregnancy, a person's health must drive important medical decisions. Patients must be able to trust their doctors to keep their personal and private information confidential. These laws would interfere with open, honest communication between doctors and patients by forcing doctors to report a patient's motivations for seeking care to authorities. Moreover, such policies may force providers to rely on stereotypes and bias in scrutinizing certain patients for their reasons for seeking medical care. Politicians' involvement will not improve these relationships and should not be policing patients' health care decisions – or requiring providers to police their patients' decision making. Abortion restrictions of all kinds prevent people from controlling their own lives and living with dignity.

Senator Leahy Question:

1. The Women's Health Protection Act is one way that Congress can act to ensure an individual's constitutional rights are protected. I am a proud cosponsor of this bill. I simply cannot comprehend the notion that legislators would know best when it comes to a personal health decision between a woman and her doctor.

    a. **Why is the Texas abortion ban such a severe intrusion on a woman's right to make her own healthcare decisions? Does it chill a woman's ability to seek information and action to address her health care needs?**

Texas SB 8 created a vigilante bounty hunter scheme. The Supreme Court endorsed this scheme even though the law conflicted with foundational constitutional principles. Over the past year, Texans have lived a nightmare as abortion access shut down across the state for the vast majority

of those seeking abortion care. Abortion bans, like the one in Texas, chill the ability of patients to seek information to address their health care needs because of the fear that their family, friends, religious leaders, trusted teachers, and abortion provider and staff could face costly lawsuits for helping them seek care or provide that care.

b. Why is it important to create a federal statutory right for health care providers to provide abortion care?

Within two weeks of the *Dobbs* decision, 11 states had abortion bans in effect, and in three additional states, clinics stopped providing abortion due to legal uncertainty. In other words, within just 14 days, 14 states were without abortion care, meaning 24.5 million women could no longer get this essential health care in their state.[33] About 11 million of these people are women of color and 1.9 are women with disabilities. All told, nearly half of states are expected to ban abortion. The *Dobbs* decision has created a patchwork system of abortion care and whether one can receive an abortion will depend directly on what state you live in. The only way to comprehensively respond to the crisis is for a clear federal right to abortion that ensures your right to abortion care no matter your zip code.

Senator Blackburn's Questions:

1. When you testified before the House in 2019, you stated that "the legislators passing restrictions on abortion want to control the lives and futures of women, denying them equality." What weight do you give to the rights of unborn girls, who are disproportionately targeted for abortion?

Every day I fight for the rights of girls and women across the country – in the schools, at work, and in society. That includes their right to make decisions for themselves, including when, whether or how to start a family. Lawmakers have no place interfering in someone else's pregnancy decisions.

2. I support protecting life. In light of your statement to the House, do you believe that I—and the other members who support the right to life—are trying to deny women equality?

We know that access to reproductive health care – including abortion – is vital to gender justice and equality. Access to abortion is a key part of a person's liberty, equality, and economic

[33] Calculations based off of: NPWF, STATE ABORTION BANS COULD HARM NEARLY 15 MILLION WOMEN OF COLOR (July 2022) (providing state-by-state data for women of reproductive age, including states where abortion is now banned), https://www.nationalpartnership.org/our-work/economic-justice/reports/state-abortion-bans-harm-woc.html?utm_source=other&utm_medium=other&utm_campaign=lij_dobbs.

security. Everyone, no matter where they live or their financial means, should have access to abortion when they need it in their communities without stigma, shame, or barriers. To achieve equality, individuals need to have control over their bodies and the freedom to make decisions about their bodies, lives, and futures. The *Dobbs* decision and subsequent abortion bans deny that to women.

Lives have been put into jeopardy by these bans. As discussed above, our country is facing a maternal mortality crisis that has a disproportionate impact on Black and Native women. Women can also face health complications for long periods, sometimes even a lifetime, following a pregnancy. Given that pregnancy carries inherent risk,[34] forcing people to carry pregnancies to term against their will threatens their health and lives in ways they do not agree to and would have done differently if they had been provided the ability to decide. Take, for example, the story of a woman in Texas who was pregnant with twins when she miscarried one of them.[35] Because of concerns she could face a life-threatening infection while pregnant with the remaining fetus, she sought an abortion. However, because of the ban on abortion, she had to wait weeks and was not given the care until she was experiencing sepsis and an acute kidney injury. Compounding these health- and life-threatening harm is the indignity of being denied the ability to decide something so consequential in their lives.

3. In direct response to pro-life policy victories like the Texas Heartbeat Act, the House passed the Women's Health Protection Act, a radical piece of legislation that goes far beyond merely codifying *Roe v. Wade*. In your written testimony, you urged the Senate to pass this legislation. One of the most reprehensible provisions in this legislation is the ban on informed consent requirements and requirements that women be given the opportunity to view an image of their unborn child or listen to their child's heartbeat. As the sponsor of the Women's Right to Know Act, I am stunned that a bill that purports to protect women's health would have such a prohibition. Doesn't a woman have the right to know about the medical risks associated with an abortion procedure?

Abortion is one of the safest medical procedures. Lawmakers opposed to abortion care should not be interfering in the decisions people are making or in the care being provided. As the National Academies of Sciences, Engineering and Medicine has said, it is medically unnecessary abortion restrictions – like forcing providers to recite a mandated script that includes lies or forcing people to undergo medically unnecessary ultrasounds – that have a negative impact on the quality-of-care patients receive.[36]

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[34] *Pregnancy Complications*, CENTERS FOR DISEASE CONTROL AND PREVENTION (April 4, 2022), https://www.cdc.gov/reproductivehealth/maternalinfanthealth/pregnancy-complications.html.
[35] Monica Hesse, *One Month in, Abortion Bans are Hell on Earth*, WASH. POST. (July 22, 2022, 7:00 AM), https://www.washingtonpost.com/lifestyle/2022/07/22/abortion-ban-effects/.
[36] Committee on Reproductive Health Services, *The Safety and Quality of Abortion Care in the United States*, THE NAT'L ACADS. OF SCIS. ENG'R MED., 1, 77, 163 (2018), https://doi.org/10.17226/24950.

4. Doesn't a woman have a right to know the probable gestational age of her child before making the decision to have an abortion?

Health care providers already must provide patients with accurate information about treatment options and their risks and benefits as part of the informed consent process. Moreover, pregnant women seeking abortion know what is best for them and have thought through their abortion procedure when they seek the care. A woman should be able to make personal medical decisions throughout pregnancy without political interference. And doctors should be able to practice care according to evidence-based standards without political interference. Throughout a pregnancy, the patient's health – not lawmakers' views – should drive important medical decisions.

5. Doesn't a woman have the right to know whether her child has a heartbeat, or that her child has the ability to feel pain?

This type of question is a misrepresentation of abortion care and only reinforces that a woman should be able to make personal medical decisions throughout pregnancy without political interference. And doctors should be able to practice care according to evidence-based standards without political interference. Throughout a pregnancy, the patient's health – not lawmakers' views – should drive important medical decisions.

6. The Supreme Court recently declined to stop the Texas Heartbeat Act from going into effect because, it explained, courts may only issue injunctions against individuals enforcing laws, not the laws themselves. If you disagree with that decision, could you identify for the Committee an example of when an American court has enjoined a statute rather than an individual?

The Supreme Court failed to preserve the rule of law in *Whole Woman's Health v. Jackson*. I am unable to think of an example in recent history where a state so brazenly sought to flout the Constitution and federal law. That the Court failed to intervene and protect the rule of law and instead greenlighted such a nefarious enforcement mechanism will only further embolden states to flout the Constitution where they disagreed with the protections. There was and is no principled end to that approach and has ultimately destabilized our understanding of the rule of law and federalism. Even before the Supreme Court's devastating *Dobbs* decision, SB 8 effectively ended abortion access for most Texans, and has been particularly damaging to people of color, especially Black women, people with low incomes, those living in rural areas, and immigrants.

7. Justices Breyer and Kagan agreed with the Chief Justice that the questions concerning whether the law could be enjoined were "particularly difficult" and that defendants "may

> be correct." Do you disagree with Justices Breyer and Kagan? If so, please explain why they are wrong.

When the Supreme Court refused to stop SB8 from taking effect, the Justices in the majority refused to uphold the rule of law and our Constitution. In a dissenting opinion that Justices Kagan and Breyer joined, Justice Sotomayor made clear how wrong the majority was to greenlight SB8:

> The Court should have put an end to this madness months ago, before S. B. 8 first went into effect. It failed to do so then, and it fails again today. I concur in the Court's judgment that the petitioners' suit may proceed against certain executive licensing officials who retain enforcement authority under Texas law, and I trust the District Court will act expeditiously to enter much-needed relief. I dissent, however, from the Court's dangerous departure from its precedents, which establish that federal courts can and should issue relief when a State enacts a law that chills the exercise of a constitutional right and aims to evade judicial review.[37]

The dissenters could not have been clearer that the Court was gravely wrong in endorsing the SB8 scheme in contravention of the Constitution and federal law. As a result of the Court's action, millions of Texans lost a right that was fundamental to our health, lives, futures, and society for nearly 50 years, just as everyone across the country did in June when the Supreme Court issued its devastating decision in *Dobbs v. Jackson Women's Health Organization*. These decisions will be remembered for the Court's clear abandonment of the rule of law and for its raw exercise of power. For further discussion of how SB8 undermined the rule of law, see additional discussion in the case briefing as well as an amicus brief that the NAACP Legal Defense Fund filed, which the National Women's Law Center joined.[38]

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[37] *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2317-2318 (2022) (Breyer, Sotomayor, and Kagan, JJ., dissenting).

[38] Legal Defense Fund, *LDF Submits Amicus Brief Highlighting Unconstitutionality of Texas' S.B. 8*, (Oct.29, 2021), https://www.naacpldf.org/press-release/ ldf-submits-amicus-brief-highlighting-unconstitutionality-of-texas-s-b-8/; Center for Reproductive Rights, *Reproductive Justice Organizations Amicus Brief in Dobbs v. Jackson Women's Health*, (Sept. 21, 2021), https://reproductiverights.org/reproductive-justice-organizations-amicus-brief-in-dobbs-v-jackson-womens-health/#:~:text=Reproductive%20Justice%20Organizations%20Amicus%20Brief%20in%20Dobbs%20v.,the%20Center%27s%20challenge%20to%20Mississippi%27s%20pre-viability%20abortion%20ban.

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STEPHEN I. VLADECK
Charles Alan Wright Chair in Federal Courts

September 7, 2022

Senator Richard J. Durbin
Chair, Committee on the Judiciary
United States Senate
Washington, D.C. 20510-6275

Re: Questions for the Record — September 29, 2021 Committee Hearing

Dear Mr. Chairman,

Further to the Senate Judiciary Committee's hearing on September 29, 2021, titled "Texas's Unconstitutional Abortion Ban and the Role of the Shadow Docket," and to your written request of August 24, 2022, I am providing the following answers to the Questions for the Record to which you have asked me to respond. For ease of reference, I have included the questions below before each of my answers.

1. Throughout the hearing, Republican members of the Judiciary Committee and some of your fellow witnesses suggested that the Supreme Court's decision in *Whole Woman's Health* v. *Jackson* was "entirely ordinary," "normal," "consistent with its emergency-docket jurisprudence," and "predictable."

   a. Do you agree with these characterizations? Why or why not?

I do not agree with these characterizations. As I've written at some length elsewhere, the Supreme Court's September 1, 2021 decision in *Whole Woman's Health* was problematic at least largely because it was **inconsistent** with its recent practices on the shadow docket — especially its willingness to overlook procedural and jurisdictional obstacles in cases in which it was asked to directly enjoin state COVID restrictions on the ground that they violated the Free Exercise Clause of the First Amendment. In *Tandon* v. *Newsom*, 141 S. Ct. 1294 (2021) (per curiam), for example, the same 5-4 majority that refused to block the Texas abortion law in *Whole Woman's Health* because of open procedural **questions** had reached out to block California's restriction on in-home gatherings notwithstanding a **fatal** procedural defect — the fact that the right at issue was not "indisputably clear."

For a Court that repeatedly brushed aside similar procedural roadblocks to vindicate **new** constitutional rights to hide behind procedural **uncertainty** to refuse to protect a clearly established right is neither "entirely ordinary," "normal," or "consistent." And insofar as it is "predictable," that's only because, by that point, the Court's inconsistent behavior in such cases **had**, unfortunately, become all-too predictable. *See generally* Stephen I. Vladeck, *The Most-Favored Right: COVID, the*

Supreme Court, and the (New) Free Exercise Clause, 15 N.Y.U. J.L. & LIBERTY 699 (2022).

b. Are these characterizations accurate descriptions of the Court's recent shadow docket jurisprudence in general?

As my above answer suggests, the only one of these characterizations that accurately describes the Court's recent shadow docket jurisprudence in general is that the **results** have become all-too predictable. It now seems beyond question, however, that the Supreme Court's recent behavior on the shadow docket is radically **inconsistent** with its historical approach to such unsigned and (usually) unexplained orders — as Justice Kagan has argued in a series of dissents, first in the September 2021 Texas abortion case, and more recently in the February 2022 Alabama redistricting case, and the April 2022 clean water act case.

2. Defenders of the Court's approach to shadow docket decisionmaking have argued that there are no issues with transparency because all shadow docket decisions are public and "freely searchable online." In your opinion, is the Court's shadow docket decisionmaking as transparent and accessible to the public as its merits docket decisions?

The September 1, 2021 decision in *Whole Woman's Health* ran 401 words. The June 2022 ruling in *Dobbs*, in which the Court overruled *Roe* v. *Wade*, ran 108 pages. There's just no argument that shadow docket rulings are "as transparent and accessible to the public." The best that can be said about this claim is that it is **formally** true that, once the Justices have handed down an unsigned and unexplained ruling on the shadow docket, that ruling can be **found** by the public on the Supreme Court's website. But (1) such rulings can be posted to any one of four different pages on the Court's website; and (2) even once the ruling has been located and the file opened, a cryptic, one-sentence order that an application for a stay has been granted is neither "transparent" nor "accessible" under almost any understanding of those terms.

3. Some academics have suggested that the shadow docket's rise in prominence is attributable to a recent rise in nationwide injunctions issued by lower courts. You have called that argument a "myth."

a. Why are nationwide injunctions an insufficient explanation for current trends with the Supreme Court's shadow docket?

There are three data points that conclusively refute claims that the rise of nationwide injunctions has caused the material uptick in the Court's shadow docket behavior. **First**, even within the dataset of emergency applications filed by the Trump administration (which typically form the basis for this claim), fewer than **half** of the 41 applications seeking emergency relief from the Supreme Court sought stays of injunctions that were nationwide in their scope. In one especially prominent example, after a January 2020 ruling in which the Justices stayed a nationwide injunction against the Trump administration's public charge rule, the Court

followed up just a few weeks later with a stay of an Illinois-specific injunction against the same rule. So even within the Trump-specific cases, the nationwide scope of relief did not explain all, or even most, of the story.

Second, the Court's problematic behavior on the shadow docket, as I documented in my testimony to the Committee, has regularly (and increasingly) involved challenges to **state** policies (where nationwide injunctions are, quite obviously, not on the table). During Chief Justice Roberts's first 15 years on the Court, for instance, the Justices issued emergency writs of injunction — directly blocking government policies pending appeal when lower courts had refused to do so — only four times. During the October 2020 Term alone, the Justices issued **seven** such injunctions, all of which were directed to COVID mitigation measures in either California or New York. Whatever else may be said about these shadow docket rulings, they had absolutely nothing to do with nationwide injunctions.

Third, if the rise of nationwide injunctions were nevertheless a factor in the rise of the shadow docket, one would expect the Court to be similarly aggressive in pausing nationwide injunctions against Biden administration policies. But in the first case in which the Biden administration sought a stay of a nationwide injunction (the MPP case in August 2021), the Court refused, over public dissents from Justices Breyer, Sotomayor, and Kagan. Some of the very same Justices who had been publicly critical of nationwide injunctions against Trump policies (especially Justices Thomas and Gorsuch) now seemed to be willing to leave such coercive relief intact when it was a Biden policy, instead. And the only ruling to date in which the Court has *stayed* a nationwide injunction against a Biden administration policy was the January 2022 ruling in the CMS vaccine mandate case — from which Justices Thomas and Gorsuch (joined by Justices Alito and Barrett) dissented.

Thus, the rise of nationwide injunctions never adequately explained the Supreme Court's behavior even in the subset of cases in which the claim is most potent; and with every day that passes, it provides even **less** of an explanation for the Court's newfound behavior on the shadow docket.

b. What other factors do you think are responsible for these current trends?

As I wrote at some length in my testimony to the Committee, my own view is that these trends can be traced to a culmination of factors — including shifts in how a majority of the Justices apply the traditional factors for emergency relief; shifts in the composition of the Court; and shifts in litigation strategy by parties to take advantage of those first two developments. The result, as Justice Kagan pointed out in her April 2022 dissent in *Louisiana v. American Rivers* (which Chief Justice Roberts, along with Justices Breyer and Sotomayor) joined, is that the new conservative majority is increasingly using the shadow docket for what are, in effect, front-loaded merits decisions. It's no surprise, given the current composition of the Court, that those decisions tend to skew in one direction. But as the continuing dissents of Chief Justice Roberts underscore, that's because those same

Justices seem increasingly comfortable ignoring or flouting procedural and jurisdictional norms and rules to reach those quasi-merits results on the shadow docket.

4. On September 30, 2021, in a speech at the Notre Dame Law School, Justice Alito criticized those who have raised concerns about the Supreme Court's use of its shadow docket. He stated: "The real critique is they disagree on the merits. Attempting to disguise the critique as about sinister procedures is unworthy."

   a. Are your concerns with the Court's use of the shadow docket based only on disagreement with the substance of the Court's decisions?

I've done my best to be very clear, including in my testimony to the Committee, that the answer is an emphatic **no**. I've regularly identified shadow docket rulings in which I thought the Court acted by the book even though I disagreed with the bottom line (a prominent example is the August 2021 ruling blocking the CDC's eviction moratorium). And I've been critical of shadow docket rulings that failed adequately to explain and defend the Court's action even when I agreed with the result it produced (such as the March 2022 ruling staying a district court injunction that would have required the Navy to deploy 26 Navy SEALs who refused to comply with the military's vaccine mandate). As lawyers, we ought to understand that the process matters even (if not especially) when we disagree with the substantive result. If anything, claims that critics like me are simply hiding our substantive opposition behind procedural objections may be more revealing in what they say about those who level them.

   b. Justice Alito also suggested that the Court should not be criticized for considering more emergency applications in recent years and equated such criticism to "complaining about the emergency room for treating too many accident victims." Do you agree with Justice Alito's characterization? Why or why not?

To my knowledge, no one **has** criticized the Court for "considering" more emergency applications in recent years. The criticisms center on the facts that the Court is (1) **granting** far more of these applications; (2) failing to adequately explain its reasons for granting them; and (3) increasingly treating its unexplained or cryptic rulings granting such relief as precedents that lower courts are bound to follow. To borrow Justice Alito's awkward metaphor, the problem isn't that the emergency room is treating too many accident victims; it's that it's putting too many casts on legs that aren't actually broken.

   c. Do you have any other comments in response to Justice Alito's speech and his comments regarding your concerns with the shadow docket?

I'm grateful that Justice Alito took the time to publicly **engage** with some of these criticisms, even if, as my above response suggests, he may have misdescribed

some of them. To me, the far better response to Justice Alito's speech is not anything I could say, but rather what the Court itself has done. Just a few weeks after the hearing (and Justice Alito's speech), the Court turned away a request for emergency relief from health care workers in Maine (who sought to challenge the state's vaccination mandate for such medical professionals). In a short but significant concurrence, Justice Barrett (joined by Justice Kavanaugh) explained not only why she wasn't voting to grant emergency relief in that case, but suggested, perhaps implicitly, that the Court had been too willing to grant emergency relief in prior cases. (Justice Alito was one of the three Justices to publicly dissent in that case; he **would** have granted an emergency injunction.) Likewise, during the October 2021 Term, the Court kicked several disputes from the shadow docket to the merits docket. In January 2022, it held oral argument on emergency applications (in the OSHA and CMS vaccine mandate cases) for the first time since the early 1970s. And in March 2022, the Justices proposed amending their own procedural rules to account, for the first time, for friend-of-the-Court briefs respecting emergency applications — tacitly conceding that these had become sufficiently common to warrant formal rules.

To be sure, I don't think the Court has gone nearly far **enough** to assuage the concerns that I raised in my testimony to the Committee, and that others have raised both at last September's hearing and since. But these are just a few of the many data points suggesting that at least **some** of the Justices — and the Court as a whole — seem to have adjusted their/its behavior in response to these criticisms. Indeed, given all that has happened since his speech, I think it would be very difficult for Justice Alito to deliver the same defense of the Court's shadow docket behavior in September 2022.

Finally, the one point in Justice Alito's speech that truly disappointed me was his suggestion that those (like me) who have been publicly critical of the Court's increasing use (and abuse) of the shadow docket are doing so "to portray the Court as having been captured by a dangerous cabal that resorts to sneaky and improper methods to get its ways," and "to intimidate the Court or damage it as an independent institution." I can't speak for others, but at least for me, the problem with the shadow docket is not the terminology; it is the behavior that the term captures. And the "damage" to the Court "as an independent institution" is not a result of the criticisms of the Court; it's a result of the Justices' continued willingness to hand down significant rulings affecting millions of Americans with insufficient — if any — explanation. For decades, the Court has operated under the understanding that its legitimacy is a function of its ability to provide principled explanations for its rulings, and that "a decision without principled justification would be no judicial act at all." The rise of the shadow docket is fundamentally anathema to that principle. And the **implications** of its growing use and abuse for the Court as an institution ought to be far more concerning to the Justices than the terminology itself — which Justice Kavanaugh criticized as "catchy but worn-out rhetoric" in a February 2022 concurrence.

* * *

I hope these answers are satisfactory — and would be delighted to provide whatever additional information may be of use to you and your colleagues on the Committee. Thank you again for the invitation to testify, and for the opportunity to follow up on that testimony here.

Sincerely yours,

Stephen I. Vladeck

Statement of NARAL Pro-Choice America
U.S. Senate Committee on the Judiciary
Texas's Unconstitutional Abortion Ban and the Role of the Shadow Docket
September 29, 2021

Thank you for the opportunity to submit a statement to the U.S. Senate Committee on the Judiciary on the vital topic of Texas's unconstitutional abortion ban, Senate Bill 8 (SB 8), and the role of the shadow docket. NARAL Pro-Choice America (NARAL) is a national advocacy organization, dedicated to protecting and advancing reproductive freedom, including access to abortion, contraception, paid leave, and protection from pregnancy discrimination, as a fundamental right and value. Through education, organizing, and influencing public policy, NARAL and our 2.5 million members from every state and congressional district in the country work to guarantee every individual the freedom to make personal decisions about their lives, bodies, and futures, free from political interference. For this reason, we are submitting this statement to reiterate the harm state-level attacks on abortion have on reproductive freedom and the compounding harm the Supreme Court's willingness to undermine constitutionally protected rights in the dark of night, including via the so-called "shadow docket."

The legal right to abortion faces its greatest threat in decades. Despite overwhelming public support (8 in 10 Americans) for the legal right to abortion, we're in the midst of an all-out assault on reproductive freedom with *Roe v. Wade* hanging in the balance. Anti-choice lawmakers are emboldened in their attack on reproductive freedom by a decades-long strategy to capture the courts, resulting in an anti-choice supermajority on the Supreme Court. This year alone, state legislatures have introduced, advanced, or passed over 330 abortion restrictions, systematically chipping away at the right to abortion across the country and pushing access to abortion care out of reach for millions of people. We are now witnessing how the anti-choice supermajority on the Court is utilizing mechanisms like the shadow docket to allow these anti-choice and unconstitutional laws to stand.

Earlier this month, the most restrictive and draconian abortion ban, Texas SB 8, went into effect in Texas, bannning abortion before most people know they are pregnant and creating a bounty hunter system for private citizens to enforce the law with an incentive of a $10,000 reward. The Supreme Court, using the shadow docket, failed to intervene and subsequently rejected an emergency request to block SB 8, a blatantly unconstitutional ban on abortion. This law bans abortion at approximately six weeks before many people even know they are pregnant. It also grants private citizens the power to sue abortion providers and anyone else who helps someone access abortion care; this includes clergy members or counselors, abortion funds that assist someone in paying for abortion care, and even someone who drives

a patient to their appointment, like family members, friends, and rideshare drivers. An individual who successfully sues someone for "aiding and abetting" a pregnant person seeking abortion care, would receive a financial reward of $10,000. The Supreme Court's decision to allow SB 8 to go into effect essentially gave Texas the green light to render *Roe v. Wade* meaningless in the state and empowered anti-choice lawmakers to use this law as a blueprint to roll back reproductive freedom in their own states. Politicians in at least 11 states have already expressed intent to introduce similar versions of Texas's abortion ban. In fact, just weeks after Texas's SB8 went into effect, anti-choice lawmakers in Florida introduced their own version of the law, HB 167.

The looming threat to the future of legal abortion across the country is the result of a decades-long far-right strategy to advance a radical and out-of-touch ideological agenda. In the late 1970s, radical conservatives weaponized the formerly non-political, back-burner issue of abortion rights as political cover for their efforts to maintain white patriarchal control amidst diminishing support for racist policies like school segregation, which had previously been the backbone of their movement. In the years immediately preceding and following *Roe v. Wade*, Evangelical Christians, who now form the backbone of the GOP, were overwhelmingly indifferent on the issue of abortion. But through the carefully crafted messages of Paul Weyrich, Jerry Falwell, and other architects of the Radical Right, abortion became the political tool of choice for a movement determined to maintain control in a changing world, and the trojan horse for a far-reaching array of ideologies meant to thwart social progress.[i]

In the intervening years, opposition to abortion has become a litmus test in far-right circles for a host of political and judicial positions. In order to advance their agenda—one that stands in direct opposition to the values of the majority of Americans—they developed and implemented a strategy for capturing and maintaining minority rule. This strategy included pushing regressive boilerplate legislation chipping away at access to abortion through state legislatures and Congress, as well as stacking the federal judiciary with anti-choice ideologues.

Anti-choice activists have spent decades building their influence over the federal judiciary through well-funded, secretive networks like the Federalist Society. Conservative activists have never been shy about the fact that their takeover of the federal judiciary is part of a broad strategy to quell the majority and cement minority rule, but the election of Donald Trump took this tactic to new heights. In May 2016, Trump pledged to only nominate anti-choice judges, a promise he doubled down on in 2020.[ii,iii] And with the help of Mitch McConnell, Trump installed anti-choice federal judges with lifetime appointments at a breakneck pace. More than a quarter of currently active federal judges are now Trump appointees, including Supreme Court justices Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett—tipping the balance of the Court to a supermajority unmistakably hostile to reproductive freedom.[iv] As Barrett's nomination and confirmation were rushed through in the midst of an ongoing election, many advocates cautioned that this was yet another part of the anti-choice strategy to ultimately overturn *Roe*. Now we have already seen this supermajority on the Court use the so-called

"shadow docket" to undermine the right to abortion and abortion access.[v] With the Court poised to hear *Dobbs v. Jackson Women's Health Organization*, a case involving a Mississippi 15-week abortion ban that is a direct challenge to *Roe v. Wade,* there is no denying that the threat to the constitutional right to abortion is real.

Thanks to the use of the shadow docket, anti-choice extremists did not have to wait for the upcoming *Dobbs* case to render abortion inaccessible and *Roe* meaningless for one in ten women of reproductive age.[vi] The shadow docket is a mechanism whereby the justices may act in an accelerated manner, at the cost of a transparent judicial proceeding and legal decision. In recent years the Court has utilized the shadow docket at a higher level than before, issuing decisions with significant impact that allow controversial policies to go into effect, often unsigned and offering no reasoning.[vii] As a result, as is the case in Texas, Americans are robbed of their constitutional rights as these laws go into effect while the constitutionality is litigated in the lower courts. When recently interviewed about the shadow docket mechanism, Justice Breyer (who dissented in the Texas law shadow docket decision) noted, "It's a huge mistake to decide major things without the normal full argument."[viii]

Anti-choice lawmakers, emboldened by the anti-choice supermajority on the Court, have accelerated their push to pass blatantly unconstitutional bans and restrictions on abortion. The Supreme Court's use of the shadow docket has further enabled this quest by allowing these laws to take effect prior to full judicial review and, as a consequence, in the interim millions of people suffer the loss of their constitutional right to abortion. NARAL strongly urges the Committee to consider the harm these state-level attacks and the shadow docket have on millions of Americans as we work toward a world where *every* body is free to make the best decisions for themselves, their families, and their lives.

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[i] Randall Balmer, *The Real Origins of the Religious Right*, POLITICO MAGAZINE (May 27, 2014), https://www.politico.com/magazine/story/2014/05/religious-right-real-origins-107133.

[ii] *Trump Letter on Pro-Life Coalition*, Sept. 2016, https://www.sba-list.org/wp-content/uploads/2016/09/Trump-Letter-on-ProLife-Coalition.pdf.

[iii] *Pro-Life Voices for Trump 2020*, Sept. 3, 2020, https://cdn.donaldjtrump.com/public-files/press_assets/pro-life-letter-potus.pdf.

[iv] John Gramlich, *How Trump compares with other recent presidents in appointing federal judges*, PEW RESEARCH CENTER (Jan. 13, 2021), https://www.pewresearch.org/fact-tank/2021/01/13/how-trump-compares-with-other-recent-presidents-in-appointing-federal-judges/.

[v] *Whole Woman's Health v. Jackson*, No. 21A24, 2021 WL 3910722 (U.S. Sept. 1, 2021); *Food & Drug Admin. v. American College of Obstetricians & Gynecologists*, 141 S.Ct. 578 (2021).

[vi] Elizabeth Nash, *Impact of Texas' Abortion Ban: A 14-Fold Increase in Driving Distance to Get an Abortion*, Guttmacher (Sep. 15, 2021), https://www.guttmacher.org/article/2021/08/impact-texas-abortion-ban-14-fold-increase-driving-distance-get-abortion. (stating that Texas has almost seven million women aged 15-49, out of a total of 75 million in the entire country).

[vii] Mike Fox, *Supreme Court Shadow Docket Leaves Reasoning in the Dark, Professors Say*, University of Virginia School of Law (Sep. 22, 2021) https://www.law.virginia.edu/news/202109/supreme-court-shadow-docket-leaves-reasoning-dark-professors-say.

[viii] Nina Totenberg, *Justice Breyer Says Supreme Court Upholding Texas Abortion Ban Was 'Very, Very, Wrong,'* NPR (Sep. 9, 2021) https://www.npr.org/2021/09/09/1035181247/justice-breyer-says-supreme-court-upholding-texas-abortion-ban-was-very-very-wro.

Statement for the Record

Of

The American College of Obstetricians and Gynecologists

Before the

Senate Committee on the Judiciary

Regarding the Hearing

Texas's Unconstitutional Abortion Ban and the Role of the Shadow Docket

September 29, 2021

Chairman Durbin, Ranking Member Grassley, and distinguished members of the Senate Committee on the Judiciary, thank you for the opportunity to submit this statement for the Committee's record of its hearing titled "Texas's Unconstitutional Abortion Ban and the Role of the Shadow Docket."

The American College of Obstetricians and Gynecologists (ACOG) is the nation's leading group of physicians providing health care for women and is the premier membership organization for obstetrician-gynecologists. With more than 62,000 members, ACOG advocates for quality health care, maintains the highest standards of clinical practice and continuing education of its members, promotes patient education, and increases awareness among its members and the public of the changing issues facing women's health care. ACOG thanks the Committee for examining the impacts of government restrictions on abortion, including Texas Senate Bill 8, which are politically motived, have no basis in medical evidence, put health care services out of reach for many individuals, and intrude upon the patient-physician relationship.

ACOG is committed to ensuring access to the full spectrum of evidence-based quality reproductive health care. Policy related to reproductive health care must be based on medical science and facts. The government can serve a valuable role in making health policy when its purpose is to improve patient health and advance medical and scientific progress.[1]

Abortion is an essential component of health care.[2] Like all medical matters, decisions regarding reproductive health care, including abortion care, should be made by patients in consultation with their clinicians and without undue interference by outside parties.[3] Like all patients, individuals seeking abortion are entitled to privacy, dignity, respect, and support.[4]

The Committee's hearing today could not come at a more pivotal time. Abortion, although still legal, is increasingly out of reach because of mounting government-imposed restrictions targeting patients, physicians, and other clinicians, and recent years have seen a dramatic increase in the number and scope of legislative measures restricting abortion.[5] This mosaic of state laws and regulations has escalated access inequities and threatens to criminalize or otherwise penalize physicians and other clinicians for providing care consistent with their medical judgment, standards of care, and their patients' needs. It cannot be overstated that the patients disproportionately harmed are people of color, those who must travel long distances to receive care such as those living in rural or other underserved areas, and individuals with low incomes. We commend the Chair for inviting witnesses to participate in the hearing who can shed light on the lived experiences of these individuals and the role that state restrictions have in indefensibly limiting their access to care. ACOG urges the Committee to generate dialogue informed by science and medical facts and guided by Congress's imperative to confront health inequities. We find ourselves in a moment that demands urgent scrutiny and swift action by Congress.

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[1] *Legislative Interference with Patient Care, Medical Decisions, and the Patient-Physician Relationship*, The American College of Obstetricians and Gynecologists, https://www.acog.org/clinical-information/policy-and-position-statements/statements-of-policy/2019/legislative-interference-with-patient-care-medical-decisions-and-the-patient-physician-relationship (reaffirmed August 2021)

[2] *Abortion Policy Statement*, The American College of Obstetricians and Gynecologists, https://www.acog.org/clinical-information/policy-and-position-statements/statements-of-policy/2020/abortion-policy (Reaffirmed Nov. 2020)

[3] *Id.*

[4] *Id.*

[5] *Increasing access to abortion.* ACOG Committee Opinion No. 815. American College of Obstetricians and Gynecologists. Obstet Gynecol 2020;136:e107–15.

This statement reviews the clinical facts regarding the provision of abortion care and gives voice to the physicians—ACOG's members—who every day face the real-world implications of political intrusions in patient care.

Texas Senate Bill 8

ACOG shares the Chairman's alarm over Texas Senate Bill 8 (SB8), which represents a clear attack on the practice of medicine, impermissibly intrudes into the patient-physician relationship, and restricts patients from making personal decisions about their health. By allowing third-party lawsuits against clinicians, by virtually banning all abortions, and by curtailing the sharing of information and support related to access to vital women's health care, SB8 creates a coercive environment for patients and clinicians across the spectrum of care and from all corners of the state.

SB8 is fundamentally at odds with the provision of safe and essential health care and longstanding principles of medical ethics. It places clinicians in the untenable position of choosing between providing care consistent with their best medical judgment, scientific evidence, and the clinicians' ethical obligations or risking legal retribution. It interferes with the patient-physician relationship and has the potential to pose grave dangers to patient well-being.

In the weeks since SB8 took effect, we are hearing alarm from our members in Texas. Physicians are concerned that an open, compassionate, and evidence-based conversation in the exam room now exposes them to legal action. They are unsure what life-threatening conditions qualify under a narrow medical emergency exception, and they are being forced to choose between following the law and doing what is best for their patients' health.

SB8 dangerously limits the ability of pregnant individuals at or beyond six weeks' gestation to obtain the health care they need. Only those with abundant financial resources will be able to travel outside of Texas to obtain an abortion. Others will be forced to seek abortion outside of the health care system or carry a pregnancy to term, increasing the likelihood of negative consequences to their physical and psychological health that could be avoided if care were available.[6]

SB8 causes particularly severe harm to patients of color, those with limited socioeconomic means, and those in rural communities. This is because, as a general matter, 75 percent of those seeking abortion are living at or below 200 percent of the federal poverty level, and the majority of patients seeking abortions identify as Black, Hispanic, Asian, or Pacific Islander.[7] Similarly, traveling out of state for medical care is more difficult, if not impossible, for patients with limited means or geographic remoteness.

Further, because more than 45 percent of pregnancies in the United States are unplanned, and because many medical conditions—including irregular periods—may mask a pregnancy, many women do not discover they are pregnant for several weeks, and may be likely to miss the six week window during which they can legally access an abortion in Texas.[8,9] It often takes time before patients who have decided

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[6] *Increasing access to abortion.* ACOG Committee Opinion No. 815. American College of Obstetricians and Gynecologists. Obstet Gynecol 2020;136:e107–15.
[7] Jerman J, Jones RK and Onda T, Characteristics of U.S. Abortion Patients in 2014 and Changes Since 2008, New York: Guttmacher Institute, 2016, https://www.guttmacher.org/report/characteristics-us-abortion-patients-2014.
[8] *Unintended Pregnancy in the United States.* Fact Sheet. Guttmacher Institute. January 2019. Available at https://www.guttmacher.org/fact-sheet/unintended-pregnancy-united-states
[9] Upadhyay UD, Weitz TA, Jones RK, Barar RE, Foster DG. Denial of abortion because of provider gestational age limits in the United States. Am J Public Health. 2014;104(9):1687-1694. doi:10.2105/AJPH.2013.301378

they need to end their pregnancy to access abortion care given the host of logistical and financial barriers many face, including paying for the procedure, and organizing transportation, accommodation, childcare, and time off from work. One recent study found that women receiving first-trimester abortions were delayed in doing so for a variety of reasons: 36.5 percent due to travel and procedure costs, 37.8 percent due to not recognizing the pregnancy, 20.3 percent due to insurance problems, and 19.9 percent due to not knowing where to find abortion care.[10]

The "medical emergency" exception under SB8 does not mitigate the law's grave dangers. This exception is drawn so narrowly that it prevents abortions even when necessary to avoid grave risks to a patient's health unless that patient is in imminent risk of death or irreversible morbidity. At six weeks' gestation, potentially life-threatening conditions may not yet have manifested or a recommended course of treatment may not yet be evident. It is untenable to force a pregnant patient to wait until their medical condition escalates to the point that "an abortion is necessary to preserve [their] life" or their pregnancy creates "serious risk of substantial and irreversible impairment of a major bodily function" before being able to seek potentially life-saving care. Nor should physicians be put in the impossible position of either waiting for a patient's health to deteriorate or face legal retribution for performing an abortion in contravention of the law.

It is impossible to fully illustrate in this testimony the extent to which SB8 causes severe harm to our members and their patients. SB8 undermines patient autonomy, interferes in the patient-physician relationship, and prevents physicians from providing safe, evidence-based care.[11] It has been condemned by clinicians across the medical specialty spectrum, from primary care to hematologists to our colleagues in oncology.[12,13] As long as SB8 remains in effect, the practice of medicine is imperiled in Texas. Meanwhile, lawmakers in other states have suggested they may try to enact their own versions of SB8. In this environment, we implore the Committee and Congress to act with urgency to codify the rights of our patients to access comprehensive health care and the rights of physicians to practice evidence-based medicine free of government intrusion.

Clinical Guidance and Medical Research Regarding Reproductive Health Care

ACOG issues evidence-based clinical practice guidelines and has developed evidence-based statements of policy on reproductive health care through a thorough, deliberative, collaborative process among leading experts in the field of women's health. Pertinent today for the Committee's consideration is our robust body of clinical guidance that spans information regarding the medical management of first trimester abortion that can be accomplished through medication[14], abortion training and education[15], abortion

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[10] *Denial of Abortion Because of Provider Gestational Age Limits in the United States.* Udapdhyay et al., 104 Am. J. Pub. Health 1687, 1689 (Sept. 2014).

[11] Global Women's Health and Rights. American College of Obstetricians and Gynecologists. Statement of Policy (reaffirmed July 2021). Available at https://www.acog.org/clinical-information/policy-and-position-statements/statements-of-policy/2018/global-womens-health-and-rights

[12]Leading Physician Groups Oppose Texas Legislation That Threatens Access to Reproductive Patient Care (Sept. 2, 2021). Available at https://www.acog.org/news/news-releases/2021/09/physician-groups-oppose-texas-legislation-threatening-access-to-reproductive-patient-care

[13] American Medical Association statement on Texas SB8 (Sept. 1, 2021). Available at https://www.ama-assn.org/press-center/ama-statements/ama-statement-texas-sb8

[14] *Medication abortion up to 70 days of gestation.* ACOG Practice Bulletin No. 225. American College of Obstetricians and Gynecologists. Obstet Gynecol 2020;136:e31–47.

[15] *Abortion training and education.* Committee Opinion No. 612. American College of Obstetricians and Gynecologists. Obstet Gynecol 2014;124:1055–9.

access[16], and clinical management of second trimester abortion procedures.[17]

Abortion is extremely safe. It has complication rates that are lower than other routine medical procedures and its complication rates are substantially lower than childbirth.[18] In the United States, over 92 percent of abortions occur within the first trimester, when abortion is safest.[19] Serious complications from abortions at all gestational ages are rare. Advances in medical science have expanded safe options for pregnancy termination. For example, medical abortion, which involves the use of medications rather than a procedure to induce an abortion, is a safe, effective option for individuals who seek termination of a first-trimester pregnancy.[20]

Notwithstanding the safety of abortion, the provision of abortion is highly regulated in many states. Particularly relevant to the hearing topic today is ACOG's Committee Opinion 815, Increasing Access to Abortion, clinical guidance that examines the impact that restrictions on abortion access have on women's health.[21] The Committee Opinion highlights certain factors that may influence or necessitate a person's decision to have an abortion. These factors include but are not limited to contraceptive failure, barriers to contraceptive use and access, rape, incest, intimate partner violence, fetal anomalies, illness during pregnancy, and exposure to teratogenic medications. Pregnancy complications, including placental abruption, bleeding from placenta previa, preeclampsia or eclampsia, and cardiac or renal conditions, may be so severe that abortion is the only measure to preserve a woman's health or save her life. All terminations are considered medically indicated.[22]

ACOG's Committee Opinion 815 further considers the substantial damage abortion restrictions may impose on health care, stating that legislative restrictions fundamentally interfere with the patient-clinician relationship and decrease access to abortion, particularly for individuals with low incomes, adolescents, people of color, people experiencing incarceration, and those living long distances from health care services.[23] The Committee Opinion calls for advocacy to oppose and overturn restrictions, improve access, and mainstream abortion as an integral component of women's health care. Government restrictions "marginalize abortion services from routine clinical care," the Committee Opinion concludes, and "are harmful to people's health and well-being." This conclusion is consistent with a study published by the National Academics of Medicine, Engineering, and Science that the greatest threats to the safety and quality of abortion in the United States are unnecessary government regulations on abortion.[24] In its assessment, the report cited that these threats impact all six attributes of health care quality: safety, effectiveness, patient-centeredness, timeliness, efficiency, and equity.[25]

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[16] *Increasing access to abortion.* ACOG Committee Opinion No. 815. American College of Obstetricians and Gynecologists. Obstet Gynecol 2020;136:e107–15.
[17] *Second-trimester abortion.* Practice Bulletin No. 135. American College of Obstetricians and Gynecologists. Obstet Gynecol 2013;121:1394—1406.
[18] National Academies of Sciences, Engineering, Medicine, *The Safety and Quality of Abortion Care in the United States* (2018) ("Safety and Quality of Abortion Care"); *see also* Raymond & Grimes, The Comparative Safety of Legal Induced Abortion and Childbirth in the United States, 119 Obstetrics & Gynecology 215, 216 (2012).
[19] Kortsmit K, Jatlaoui T, Mandel M, et al. Abortion Surveillance—United States, 2018. MMWR Morb Mortal Wkly Surveillance Summaries. Nov. 27 2020;69(7);1-29.
[20] *Medication abortion up to 70 days of gestation.* ACOG Practice Bulletin No. 225. American College of Obstetricians and Gynecologists. Obstet Gynecol 2020;136:e31–47.
[21] *Increasing access to abortion.* ACOG Committee Opinion No. 815. American College of Obstetricians and Gynecologists. Obstet Gynecol 2020;136:e107–15.
[22] *Id.*
[23] *Id.*
[24] *The Safety and Quality of Abortion Care in the United States.* National Academies of Sciences, Engineering, and Medicine. (March 2018). Available at https://www.nap.edu/read/24950/chapter/1
[25] *Id.*

Moreover, ACOG, along with representatives from the National Partnership for Women & Families, American College of Physicians, American Academy of Family Physicians, American College of Nurse-Midwives, Nurse Practitioners in Women's Health, and the Society of Family Planning recently led a rigorous review of the available evidence and guidelines that inform safe delivery of outpatient care.[26] The objective of this study was to inform policy regarding the provision of procedures in primary care, including the field of obstetrics and gynecology, in order to further health care quality, safety, affordability, and patient experience without imposing unjustified burdens on patients' access to care or on clinicians' ability to provide care within their scope of practice. In the published findings, the authors note that in policy and law, regulation of abortion is frequently treated differently from other health services.[27] They affirm that the safety of abortion is similar to that of other types of office- and clinic-based procedures, and any facility requirements should be based on assuring high quality, safe performance of all such procedures, but conclude that false concerns for patient safety are being used as a justification for promoting regulations that specifically target abortion.

As you consider today's testimony, we urge your discourse and questioning to be informed by this evidence-based research and guidance.

The Importance of Using Medically Accurate Terminology and Information

Public and political discourse regarding abortion is too often inaccurate and not based on medical science. False claims undermine the public's trust in obstetrician-gynecologists and stigmatize necessary health care. We urge members of the Committee today to be aware that medically inaccurate and inflammatory language can contribute to or encourage hostility or violence toward physicians, other medical professionals, or individuals seeking or receiving basic health care services.

ACOG also seeks to correct false claims that have been made in the public discourse that abortion is never medically necessary. This is a dangerous narrative, which ACOG appreciates the opportunity to clarify for the Committee. Pregnancy imposes significant physiological changes on a person's body. These changes can exacerbate underlying or preexisting conditions, like renal or cardiac disease, and can severely compromise health or even cause death. Our members are focused on protecting the health and lives of their patients, and determining the appropriate medical intervention based on a patient's specific condition, without unjustified government mandates, is critical to their ability to provide quality care. This includes situations where abortion is the only medical intervention that can preserve a patient's health or save their life.[28]

When discussing policy related to health care, terminology is critically important. Patient care should never be legislated on false or inaccurate premises. One example found in many policy contexts is the deployment of the term "heartbeat" to impose arbitrary abortion bans that are not reflective of clinical fact. While contemporary ultrasound can detect an electrically induced flickering of a portion of the embryonic tissue at about six weeks gestation, structurally and in function, a fetus' heart develops over the entire course of pregnancy and does not complete development or function fully until after delivery.[29]

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[26] *Report from the project on facility guidelines for the safe performance of primary care and gynecology procedures in offices and clinics*. American College of Obstetricians and Gynecologists. Obstet Gynecol 2019;133:255–60.
[27] *Id.*
[28] *Abortion Can Be Medically Necessary.* Statement of the American College of Obstetricians and Gynecologists (Sept. 2019), *at* https://www.acog.org/news/news-releases/2019/09/abortion-can-be-medically-necessary
[29] *Doctor's Organization: Fetal Heartbeat Bills Language Is Misleading*, The Guardian, June 7, 2019, https://www.theguardian.com/world/2019/jun/05/abortion-doctors-fetal-heartbeat-bills-language-misleading

State Restrictions on Reproductive Health Care

ACOG has long opposed unnecessary, unjustified government restrictions on abortion, and works to prevent political interference into medical decision making that is inappropriate, ill-advised, and dangerous.[30] While ACOG recognizes that individuals, including obstetrician-gynecologists, may be personally opposed to abortion, neither politicians nor clinicians should seek to impose their personal beliefs upon patients or allow personal beliefs to compromise patient health, access to and quality of care, or informed consent.[31]

Recent years have seen a dramatic increase in the number and scope of legislative measures restricting abortion. Clinicians across the country are faced with an impossible choice: providing medically appropriate, evidence-based care to a patient—potentially risking civil or criminal penalties, including jail time— or complying with the law and not providing patient care. Examples include:

- **Requirements that clinicians perform specific tests or medical procedures that are not clinically indicated** or generally required for the provision of medically comparable procedures.[32,33]

- **Forcing clinicians to offer or provide patients medically inaccurate information prior to or during abortion services.** Laws that compel physicians to provide or steer patients toward medically inaccurate scripted information are in direct violation of a physician's oath to care. They infringe on patient counseling and manipulate informed consent, an ethical doctrine that is rooted in the concept of self-determination and the fundamental understanding that patients have the right to make their own decisions regarding their own health.[34]

- **Banning abortion at arbitrary gestational ages with no medical justification,** interfering with the ability to provide compassionate and evidence-based care.[35]

- **Banning or restricting abortion based on a person's reason or perceived reason for seeking care,** threatening honest, open conversations between patients and their clinicians.[36]

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[30] *Legislative Interference with Patient Care, Medical Decisions, and the Patient-Physician Relationship*, The American College of Obstetricians and Gynecologists, https://www.acog.org/clinical-information/policy-and-position-statements/statements-of-policy/2019/legislative-interference-with-patient-care-medical-decisions-and-the-patient-physician-relationship (reaffirmed August 2021)

[31] *Abortion Policy Statement*, The American College of Obstetricians and Gynecologists, https://www.acog.org/clinical-information/policy-and-position-statements/statements-of-policy/2020/abortion-policy (Nov. 2014)

[32] *Legislative Interference with Patient Care, Medical Decisions, and the Patient-Physician Relationship*, The American College of Obstetricians and Gynecologists, https://www.acog.org/clinical-information/policy-and-position-statements/statements-of-policy/2019/legislative-interference-with-patient-care-medical-decisions-and-the-patient-physician-relationship (reaffirmed August 2021)

[33] *Legislative interference with the patient-physician relationship.* Weiuberger SE, Lawrence HC 3rd, Henley DE, Alden ER, Hoyt DB.. N Engl J Med 2012;367:1557-9.

[34] *Misinformed Consent: The Medical Accuracy of State-Developed Abortion Counseling Materials.* Richardson, C.T., & Nash, E.. Guttmacher Policy Review 2006; 9 (4), 6-11. At https://www.guttmacher.org/sites/default/files/article_files/gpr090406.pdf

[35] *ACOG Statement on Abortion Bans*, The American College of Obstetricians and Gynecologists, https://www.acog.org/news/news-releases/2019/05/acog-statement-on-abortion-bans

[36] *Abortion Can Be Medically Necessary.* Statement of the American College of Obstetricians and Gynecologists (Sept. 2019), *at* https://www.acog.org/news/news-releases/2019/09/abortion-can-be-medically-necessary

- **Mandating medically specific procedures or diagnostic protocols clinicians must follow.** Decisions about a patient's medical care and management are always best made between the patient and the expert in medical care. Government mandates, such as an ultrasound or pelvic exam before an abortion, force clinicians to practice medicine without regard for clinical best practices.[37]

- **Banning medically indicated procedures, such as dilation and evacuation (D&E)**. The proliferation of bans across the country on the safest and medically preferred abortion procedure in the second trimester tie the hands of physicians. D&E is an evidence-based procedure, and in some cases it is necessary to preserve a patient's health or their future fertility.[38]

- **Holding abortion facilities and clinicians to exhaustive regulatory standards without justification,** including unnecessary structural requirements, and that physicians obtain admitting privileges and transfer agreements at local hospitals. As mentioned previously, ACOG, along with colleague organizations across the women's health and primary care fields, led a rigorous review of the available evidence and guidelines that inform safe delivery of outpatient care. In the published findings, the authors note that in policy and law, regulation of abortion is frequently treated differently from other health services, and false concerns for patient safety are being used as a justification for promoting regulations that specifically target abortion.[39] Targeted facility and staffing requirements make abortion inaccessible for some people and create delays for others, leading to an increase in abortion after the first trimester.[40]

- **Requiring facility inspections and reporting requirements that do not improve safety, jeopardize patient privacy, and intimidate physicians, patients, and clinic staff.**[41]

- **Requiring a patient to make in-person trips prior to an abortion irrespective of any medical justification**. Requiring unnecessary trips (including across state borders) when seeking abortion care imposes prohibitive geographic and financial barriers, and disproportionately negatively impacts people with low incomes, people living in rural areas, and people in states with a paucity of abortion clinics.[42]

- **Bans on telemedicine abortion as an option for patients.** ACOG practice guidelines affirm the safety and effectiveness of telemedicine for medication abortion delivery.[43] Telemedicine is a tool that promises to improve access to many health services in our country, yet states, while innovating telemedicine delivery in many areas of health care, have singled out, rather than

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[37] *Legislative Interference with Patient Care, Medical Decisions, and the Patient-Physician Relationship*, The American College of Obstetricians and Gynecologists, https://www.acog.org/clinical-information/policy-and-position-statements/statements-of-policy/2019/legislative-interference-with-patient-care-medical-decisions-and-the-patient-physician-relationship (reaffirmed August 2021)

[38] *Second-trimester abortion*. Practice Bulletin No. 135. American College of Obstetricians and Gynecologists. Obstet Gynecol 2013;121:1394—1406.

[39] *Report from the project on facility guidelines for the safe performance of primary care and gynecology procedures in offices and clinics*. American College of Obstetricians and Gynecologists. Obstet Gynecol 2019;133:255–60.

[40] *Increasing access to abortion.* ACOG Committee Opinion No. 815. American College of Obstetricians and Gynecologists. Obstet Gynecol 2020;136:e107–15.

[41] *Id.*

[42] *Barriers to Abortion Care and Their Consequences for Patients Traveling for Services: Qualitative Findings from States.* Jerman,J., Frohwirth, L. Kavanaugh, ML. & Blades, N. Perspect Sex Reprod Health. 2017 Jun; 49(2):95-102.

[43] *Medication abortion up to 70 days of gestation*. ACOG Practice Bulletin No. 225. American College of Obstetricians and Gynecologists. Obstet Gynecol 2020;136:e31–47.

included, abortion care in these efforts. Peer-reviewed studies have confirmed the safety and effectiveness of medication abortion using telemedicine, including one study that concluded little differentiation in outcomes in a data set of nearly 20,000 patients, and another that evaluated data from across the country and found no difference in safe outcomes by region as well as high rates of patient satisfaction with their experience.[44,45]

- **Restrictions and bans on the use and dispensing of medication abortion**, including mifepristone, one of the safe and effective medications used in a medication abortion regimen.[46]

- **Limiting the pool of appropriately trained and credentialed clinicians from whom patients can access care by banning qualified advanced practice clinicians from providing abortion care and restricting clinical training.** Advanced practice clinicians (APCs) possess the clinical and counseling skills necessary to provide first-trimester abortion safely, and there is no medical rationale or benefit to restricting early abortion care to physicians. A substantial body of evidence demonstrates that APCs can safely and effectively provide early abortion care.[47,48] These studies conclude that complications are rare and no more common for APCs than for physicians.[49] In addition to equivalent efficacy and safety of abortion provision by physicians and APCs, studies also show that patient experience and satisfaction is not statistically different than when the services are provided by physicians.[50]

- **Impeding abortion services even when it is in a clinician's medical judgement that delay would pose a risk to the patient's health.**[51] Pregnancy imposes significant physiological changes on a person's body. These changes can exacerbate underlying or preexisting conditions and can severely compromise health. Physicians should never be put in the position of having to wait for a medical condition to worsen or become life-threatening before being able to provide evidence-based care to their patients, including abortion.

States have imposed a panoply of other barriers to patient care. They include requiring forced waiting periods prior to the provision of abortion care which can, in practice, amount to delays of weeks; insurance coverage bans, both federally and at the state level, that make abortion care cost-prohibitive; and parental involvement requirements that routinely deny minors access to confidential care. None of these restrictions are medically justified. This patchwork of laws substantially limits patient access to care.

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[44] *The TelAbortion project: Delivering the Abortion Pill to your Doorstep by Telemedicine and Mail.* Chong, E., Ryamond, W., Kaneshiro, B., Baldwin, M. Prigue, E., Winikoff, B. Obstetrics & Gynecology: May 2018 - Volume 131 - Issue - p 53S

[45] *Safety of Medical Abortion Provided Through Telemedicine Compared With In Person.* Grossman, D & Gindlay, K. Obstet Gynecol. 2017 Oct;130(4):778-782.

[46] *Improving Access to Mifepristone for Reproductive Health Indications*, The American College of Obstetricians and Gynecologists (June 2018). *At* https://www.acog.org/clinical-information/policy-and-position-statements/position-statements/2018/improving-access-to-mifepristone-for-reproductive-health-indications

[47] *Abortion Training and Education. Committee Opinion No. 612.* American College of Obstetricians and Gynecologists (Reaffirmed 2019). *At* https://www.acog.org/Clinical-Guidance-and-Publications/Committee-Opinions/Committee-on-Health-Care-for-Underserved-Women/Abortion-Training-and-Education

[48] *The Safety and Quality of Abortion Care in the United States.* National Academies of Sciences, Engineering, and Medicine. (March 2018). *At* https://www.nap.edu/read/24950/chapter/1

[49] *Id.*

[50] *Id.*

[51] *Increasing access to abortion.* ACOG Committee Opinion No. 815. American College of Obstetricians and Gynecologists. Obstet Gynecol 2020;136:e107–15.

Restrictive legislation also can exacerbate or result in non-legislative obstacles to abortion care. This Committee must consider the threat of stigma, harassment, and fear of violence our members who provide abortion care navigate daily. Since 1993, anti-abortion violence has led to 11 murders and 26 attempted murders. Clinicians who provide abortion care also have been directly targeted with death threats, other threats of harm, and stalking, among other violent acts.[52]

What Abortion Restrictions Mean for People Facing Increased Barriers

Adolescents, people of color, those living in rural areas, those with low incomes, and incarcerated people can face disproportionate effects of restrictions on abortion access.[53] This Committee must consider the already vast access divides that abortion restrictions widen, for example:

- Restrictions and requirements of clinicians who provide abortions, restrictions on the use of telemedicine, and legislatively imposed mandatory delay all have a disproportionate effect on people living in rural areas.

- People living on low incomes most acutely face federal and state restrictions on public and private insurance coverage of abortion, including plans offered through the insurance exchanges established under health care reform.

- As of 2020, parental involvement of some kind in a minor's decision to access abortion is required in 37 states and may contribute to delays accessing care.

- Although people who are incarcerated possess the legal right to abortion, accessibility varies widely.

- Immigrants can face difficulties accessing abortion care, including language and financial barriers, as well as limited knowledge of available services.

- Transgender men and gender-diverse individuals also may face barriers accessing abortion services.[54] Discriminatory policies in the health care system, including abortion restrictions, perpetuate inequities experienced by this population.

What Abortion Restrictions Mean for Physicians and Other Clinicians

Representing more than 62,000 physicians and other providers of women's health care, ACOG takes this opportunity to also highlight for the Committee the lived experiences of our members, and to share what restrictions have meant in real terms for their practices and their patients.

In the face of abortion bans sweeping the country, ACOG has received serious reports of concern from our members impacted by these laws. They have expressed how restrictions and, in some cases, the threat of criminal penalties, impede their ability to provide evidence-based medical care. For example, we heard from one ACOG Fellow in Wisconsin who described how restrictions with limited exceptions and vague legal language created an environment of confusion as to when providing lifesaving care would result in criminal penalties for physicians. Another ACOG Fellow recounted how restrictive policies with limited exceptions force physicians to wait until a patient's health has so deteriorated the they would die without such care. An ACOG Fellow practicing in Pennsylvania noted how the combined restrictions of the Hyde

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[52] *Id.*
[53] *Id.*
[54] *Id.*

Amendment and state insurance prohibitions have limited or delayed access to lifesaving abortion care for their patients. These stories teach us about the real-world impacts of legislative interference in the physician-patient relationship.

Even in states where litigation has halted state restrictions from going into effect, the damage caused can be profound. One ACOG Fellow living in Ohio who is a specialist in high-risk obstetrics recounted that even though some of the most extreme state abortion restrictions are currently blocked by the courts, their mere existence creates confusion for clinicians and patients and undermines patient care, with clinicians never knowing when the legal environment could change and turn them into criminals. In South Carolina, a Fellow relayed how the passage of a six-week ban on abortion, even though it was enjoined, resulted in patient and clinician confusion, cancelled appointments, and disruptions to patient care. The uncertainty and misconceptions caused by proposed state restrictions disproportionately impact people who already are vulnerable to disparities in accessing abortion, including those with low incomes and people of color.[55]

ACOG physicians have also recounted the ways in which their patients accessed abortion care to save their lives and protect their health. Again and again, our physicians' experiences demonstrate that every patient's circumstance is unique, and why one-size-fits-all mandates, combined with medically inaccurate rhetoric and stigma, impose significant harmful barriers to access to care.

Conclusion

ACOG urges Congress to protect patients and their physicians from unwarranted intrusions into the practice of medicine and the patient-physician relationship. Critical first steps include passage of S. 1975, the Women's Health Protection Act, which would create federal protections against restrictions that have no health benefits and intrude upon the patient-physician relationship. This bill promotes and protects access to abortion services by safeguarding patients and medical professionals from limitations or requirements that single out the provision of abortion services, clinicians who provide and refer for abortion services, and facilities in which abortion services are provided.[56] We also urge passage of S. 1021, the Equal Access to Abortion Coverage in Health Insurance (EACH) Act to ensure that everyone, regardless of economic status and geographic location, has access to abortion by repealing the Hyde Amendment.

Thank you for the opportunity to highlight our clinical guidance regarding reproductive health care, the importance of evidence-based research, our members' experiences, and the experiences of the patients for whom they care. ACOG looks forward to continued work with the Committee to protect access to comprehensive reproductive health care.

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[55] *Passage of abortion ban and women's accurate understand of abortion legality.* Gallo MF, Casterline JB, Chakraborty P, et al. Obstetrics & Gynecology: Feb 2021. DOI: https://doi.org/10.1016/j.ajog.2021.02.009

[56] Women's Health Protection Act of 2021, S. 1975, 117th Cong. (2021)

ALLIANCE FOR JUSTICE

September 28, 2021

The Honorable Richard Durbin
Chairman
Senate Judiciary Committee

Dear Chairman Durbin:

On behalf of Alliance for Justice (AFJ), a national association representing over 130 public interest and civil rights organizations, I write to thank you for holding this crucial hearing: *Texas's Unconstitutional Abortion Ban and the Role of the Shadow Docket*. The Supreme Court's recent abuse of the shadow docket has rolled back rights and legal protections for millions of Americans, and has done so without public deliberation or transparency. We are confident this hearing will draw necessary attention to the threat the shadow docket poses to the legitimacy of our judicial system, the health and reproductive care of millions of people, and the rights of countless Americans.

As you know, the Supreme Court's shadow docket has existed since the Court's inception. The docket, also called the orders docket, exists to decide procedural issues and requests for emergency relief before a full hearing on the merits can take place. And because the shadow docket is not supposed to decide the merits of a case, the docket's procedures are bare bones—again, assuming more substantive procedures and decisions will take place once the case has been fully briefed and argued.

But today, the orders docket's purpose has been corrupted. The Supreme Court, led by its most right-wing members, is using the shadow docket to effectively decide the merits of many cases, including those that are most controversial, with limited or nonexistent briefing, no oral argument, and unsigned decisions published, usually, without explanation. In the last five years alone, the Court has used the shadow docket—too often in the dead of night and without full briefing or argument or transparency—to advance a partisan and ideological agenda. For example, the Court showed extreme deference to the Trump administration by issuing 28 orders protecting its policies and blocking lower courts that ruled against them. The Biden Administration has not received similar deference from the Court.

Substantively, the Court's ideological use of the shadow docket has undermined the rights of millions including undermining the constitutional right to an abortion, eroding our democracy by making it harder for Americans to vote, and limiting the ability of government officials to protect the public's health in the middle of a worldwide pandemic. The following examples show just how out of control the Court's use of the shadow docket has become:

- The Court has used the shadow docket to undermine the health and lives of pregnant people. The Court's recent Texas order, which was unsigned and just one paragraph in length, ignored nearly 50 years of established legal precedent recognizing the constitutional right to an abortion. Because 85 percent to 90 percent of people who access abortions in Texas are at least six weeks pregnant, the law makes abortion virtually impossible for people in the state. Because people now must travel out of state to access abortion, the state's most vulnerable people of reproductive age will now face enormous barriers to exercise their constitutionally protected right to an abortion, especially people of color, low-income people, and immigrants. According to a study by the Guttmacher Institute, the average distance a pregnant Texan must travel to access abortion will increase from 12 miles to 248 miles due to the law.
- The Court has used the shadow docket to make it harder for people of color and low-income people to vote. As just one example, in April 2020, during the earliest days of the COVID-19 pandemic, the Court used the shadow docket to block an extended mail-in ballot deadline for Wisconsin voters and force voters to risk their livelihood to vote in-person or sit out the election. The consequences were dire; looking at COVID-19 rates in the state after Election Day, one study found that case rates spiked in counties across the state that had more in-person voters per polling location.
- The Court has used the shadow docket to undermine public health and the safety of incarcerated people. For example, in November 2020, the Court refused to reinstate a trial judge's order requiring a Texas prison for elderly people to implement basic cleaning measures. After the Court blocked the safety measures, 40 percent of incarcerated people at the prison contracted COVID-19 and 20 died.
- The Court has used the shadow docket to put thousands of vulnerable asylum-seekers at risk. On August 24, a Supreme Court majority enabled a reinstatement of President Trump's unlawful "remain in Mexico" policy, dangerously interfering with the President's foreign policy powers and leaving asylum-seekers in grave danger. The decision was a marked reversal from the Court's posture during the Trump Administration, when the Court consistently held that President Trump had broad constitutional authority on foreign policy issues such as the infamous "Muslim ban."
- The Court has used the shadow docket to threaten millions with homelessness as the Delta variant surged. As COVID-19 cases spiked in August 2021, the Court ruled to end the nationwide eviction moratorium enacted to stop the spread of the virus. When countless Americans are facing unemployment and financial instability through no fault of their own, the decision left at least 6 million people on the brink of eviction and greater risk of contracting COVID-19.
- The Court used the shadow docket to attack LGBTQ+ equality. In 2019, the Court's ultraconservative Justices allowed President Trump's ban on transgender service members to go into effect, jeopardizing the careers and safety of thousands of transgender people who had committed their lives to serving our country and protecting our national security through military service.
- The Court has used the shadow docket to allow the execution of people on death row with unresolved constitutional issues. In one such case in 2020, Wesley Ira Purkey's execution was halted by a district court the day he was scheduled to die. Purkey had schizophrenia and Alzheimer's, and executing someone deemed incompetent is a violation of the Eighth Amendment. Later that day, the district court's decision was upheld by an appellate court. At 2:45am the next day, the Supreme Court ruled without explanation that Purkey's execution should proceed anyway. He was killed a few hours later at 8:19am.

Indeed, the flagrant violation of the Court's norms has become so pronounced that several members of the Court have begun to issue public dissents to a majority of Court's orders—shadow docket decisions almost

never included dissents in the George W. Bush and Obama Administrations.

There is no reason to believe the abuse of the shadow docket will stop anytime soon. So thank you again for holding this hearing to shed further light on the shadow docket. The Court's procedures of the merits docket are in place for a reason: They work to ensure the highest-quality legal analysis, increase transparency, and thwart the politicization of the Court. The Court's sidelining of these procedures and embrace of the shadow docket to render its decisions is a dire threat to the legitimacy of the Court and the rule of law in the United States. AFJ applauds your examining a practice that has eroded the public's trust in the Supreme Court. We look forward to working with you in the coming years to restore a court system truly committed to equal justice under law. The stakes for our institutions—and the American people—could not be higher.

Sincerely,

Rakim Brooks
President, Alliance for Justice

CONSTITUTIONAL ACCOUNTABILITY CENTER

Statement of the Constitutional Accountability Center

Hearing on "Texas's Unconstitutional Abortion Ban and the Role of the Shadow Docket"

Committee on the Judiciary
United States Senate
September 29, 2021

The Constitutional Accountability Center (CAC) is a non-partisan think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text, history, and values. We work in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees.

The federal judiciary, with the Supreme Court at its head, provides in our constitutional democracy the promise of access to justice, in aid of establishing a government that is both accountable to the people and protective of their rights and liberties.[1] But the Court has far too often fallen short of that promise.

Public faith in the Court's ability to administer equal justice under law has been shaken for a number of reasons. Among them is the Supreme Court's emergency orders process—known as the shadow docket. When the Court issues orders as part of its shadow docket, it is all too often acting without the sustained consideration, reflection, transparency, and accountability Americans expect from their highest Court. In today's hearing, the Senate Judiciary Committee rightly focuses on the egregious shadow docket ruling with respect to S.B. 8, Texas's unconstitutional restriction on the right to access abortion care. But this ruling is just the most recent in a series of troubling emergency orders—including orders that had to do with the federal eviction moratorium and the Trump Administration's "Remain-in-Mexico" asylum policy—that should concern lawmakers and the public alike. With its shadow docket rulings, the Court is deciding matters of life and death and issues of vital importance to the daily lives of people in this country—and sometimes shifting the law significantly in the process—in ways that are not in line with the hallmarks of fairness and transparency we expect and deserve from the Supreme Court.

I. *The Rise of the Shadow Docket and Why It Harms the Judicial Process*

One of the most important developments of recent years is the stunning expansion of what has been called the Supreme Court's shadow docket, the part of the Court's docket that resolves emergency applications for relief, such as stays or injunctions pending appeal or pending an application for a writ of certiorari.[2] The shadow

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[1] *See* David Gans, *The Keystone of the Arch: The Text and History of Article III and the Constitution's Promise of Access to Courts* 1 (Constitutional Accountability Center, 2016), https://www.theusconstitution.org/think_tank/the-keystone-of-the-arch-the-text-and-history-of-article-iii-and-the-constitutions-promise-of-access-to-courts/.

[2] William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & Liberty 1, 1 (2015) (describing the Court's "shadow docket" as encompassing "a range of orders and summary decisions that defy its normal procedural regularity"); Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 Harv. L. Rev. 123, 125 (2019) (describing the "shadow docket" as the "significant volume of orders and summary decisions that the Court issues without full briefing and oral argument"). As described by Professor Baude, the shadow docket includes both stay orders, which generally are unsigned, considered expeditiously, and provide

docket lacks the crucial features that ensure transparency, impartiality, accountability, and procedural regularity to the litigants and to the American people. The Justices' consideration and decision-making is rushed, briefing takes place on a very expedited schedule, which often precludes briefing by friends-of-the-court, and there is no opportunity for oral argument. Shadow docket orders are often accompanied by cursory opinions or no opinions at all and the actual votes are often shrouded in mystery. Most of the time, it is impossible to tell how all of the Justices actually voted.[3]

While some process for adjudicating emergency requests for relief is essential, in the Roberts Court, the orders process has become a significant way for the Justices to make new law binding on the lower courts and to alter the rights and responsibilities of huge numbers of people with little to no reasoning, opportunity for broad participation by interested parties, or time for careful deliberation. This is a troubling development that threatens the legitimacy of the Supreme Court and its capacity to do justice for all the litigants that come before it. As Justice Sonia Sotomayor has noted, by issuing orders in this way, the Court "undermines the public's expectation that its highest court will act only after considered deliberation"[4] and "erodes the fair and balanced decision making process"[5] that should be the hallmark of the judicial process.

A few aspects of the Roberts Court's use of the shadow docket merit mention.

First, the shadow docket now approaches in significance the Court's regular merits docket, which has decreased in size as the shadow docket has expanded by leaps and bounds. In the 2020 term, for example, the Supreme Court delivered fifty-eight opinions in argued cases.[6] By contrast, according to a recent empirical study conducted by Reuters,[7] during the 2020 term, there were 150 shadow docket rulings on applications for emergency relief, not counting purely procedural applications, which resulted in twenty-nine applications granted at least in part, many producing rulings altering the status quo and affecting the rights and obligations of huge numbers of people. Accounting for the work of the Court without taking account of the shadow docket is now a precarious undertaking.[8]

Second, one of the most jarring statistics in the Reuters study reveals the depth of the lack of transparency—out of 150 shadow docket rulings, the full vote breakdown among the justices is known in only fourteen.[9] For the overwhelming number of shadow docket applications for relief, we simply do not know how the justices

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little to no substantive analysis, and summary reversals of lower court rulings, which receive more thorough consideration and typically result in the publication of a short opinion. The focus of our testimony is on the former type of orders.

[3] Baude, *supra* note 2, at 14 ("Not only are we often ignorant of the Justices' reasoning, we often do not even know the votes of the orders with any certainty. While Justices do sometimes write or note dissents from various orders, they do not always note a dissent from an order with which they disagree."); *see Arthur v. Dunn*, 137 S. Ct. 14, 15 (2016) (Mem.) (statement of Roberts, C.J.) (providing a courtesy fifth vote to grant a stay in a case in which only two dissents were publicly noted).

[4] *Little v. Reclaim Idaho*, 140 S. Ct. 2616, 2619 (2020) (Mem.) (Sotomayor, J., dissenting).

[5] *Wolf v. Cook County*, 140 S. Ct. 681, 684 (2020) (Mem.) (Sotomayor, J., dissenting).

[6] SCOTUSblog, Statistics, https://www.scotusblog.com/statistics/ (last visited Sept. 28, 2021).

[7] Lawrence Hurley & Andrew Chung, *Analysis: U.S. Supreme Court's 'Shadow Docket' Favored Religion and Trump*, Reuters (July 28, 2021), https://www.reuters.com/legal/government/us-supreme-courts-shadow-docket-favored-religion-trump-2021-07-28/.

[8] *See, e.g.*, Nina Totenberg, *The Supreme Court's Term Appeared to Be Cautious. The Numbers Tell A Different Story*, NPR (July 9, 2021), https://www.npr.org/2021/07/09/1013951873/the-supreme-courts-term-appeared-to-be-cautious-the-numbers-tell-a-different-sto (observing that, despite a veneer of moderation, "liberals' losses grow only more pronounced if you look at the cases decided without the court's normal procedures — emergency appeals to block lower court orders, known as the shadow docket").

[9] Hurley & Chung, *supra* note 7.

voted. The justices are participating in a secretive system for deciding a huge number of cases that leaves the American people in the dark about the votes they cast. This is unacceptable and unnecessary.

Third, the empirical evidence from the 2020 term reveals that the shadow docket is, all too often, heavily slanted in favor of certain parties. For some litigants, among them the Trump administration, religious entities challenging COVID-19 orders, and states, the "exceptional mechanism" of emergency relief has become the "new normal."[10] In the 2020 term, the Supreme Court never turned down a single Trump administration request for relief. Also in the 2020 term, the Court employed the shadow docket to rush through federal executions before President Trump's term ended,[11] allow the Trump administration to cut short the Census,[12] and impose new restrictions that make it harder for individuals to obtain medical abortions.[13] For others, the courthouse doors remain bolted shut. No statistic better illustrates this than the fact that, in the 2020 term, plaintiffs seeking religious exemptions through the shadow docket won ten times, while no other private litigant succeeded in obtaining emergency relief.[14] Voters seeking to challenge laws that make it harder to cast a ballot,[15] prisoners on death row,[16] and inmates ravaged by the spread of COVID-19[17] all saw their pleas for relief rejected.

Fourth, not only has the Roberts Court expanded its shadow docket in seismic ways, it has transformed the role the emergency orders process plays in the Supreme Court's decision-making process. A deeply troubling aspect of the Supreme Court's expansion of the shadow docket is a new predilection to use shadow docket applications for emergency relief to craft new substantive legal doctrines binding on the lower courts. The Court's shadow docket decision-making processes are ill-suited to establishing binding legal rules. Rushed decision-making and the lack of full briefing, *amicus* participation, and oral argument create an overwhelming risk of error and invite the premature adjudication of difficult constitutional issues without time for appropriate

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[10] *Barr v. E. Bay Sanctuary Covenant*, 140 S. Ct. 3, 6 (2019) (Mem.) (Sotomayor, J., dissenting).

[11] *See, e.g.*, *Barr v. Lee*, 140 S. Ct. 2590 (2020) (per curiam); *Barr v. Purkey*, 140 S. Ct. 2594 (2020) (Mem.); *United States v. Higgs*, 141 S. Ct. 645 (2021) (Mem.); *Barr v. Hall*, 141 S. Ct. 869 (2020) (Mem.); *Rosen v. Montgomery*, 141 S. Ct. 1232 (2021) (Mem.); *United States v. Montgomery*, 141 S. Ct. 1233 (2021) (Mem.). For discussion, see Lee Kovarsky, *The Trump Executions*, U. Tex. L., Pub. L. Research Paper, at 41 (July 22, 2021), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=389178 (explaining that "[w]hen it came to the Trump Executions, the Supreme Court broke with established practice. They dissolved lower-court stays at an unprecedented rate, and did so without contemporaneous merits dispositions"). As Professor Kovarsky explains, the "record suggests (overwhelmingly) that the Justices were using the shadow docket to police the inaugural margin, presumably because they believed that executions scheduled beyond the margin would not take place." *Id.*

[12] *Ross v. Nat'l Urb. League*, 141 S. Ct. 18 (2020) (Mem.).

[13] *FDA v. Am. Coll. of Obstetricians & Gynecologists*, 141 S. Ct. 578 (2021) (Mem.).

[14] *See* Hurley & Chung, *supra* note 7. For the cases, see *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020) (per curiam); *High Plains Harvest Church v. Polis*, 141 S. Ct. 527 (2020) (Mem.); *S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716 (2021) (Mem.); *Harvest Rock Church, Inc. v. Newsom*, 141 S. Ct. 889 (2020) (Mem.); *Agudath Israel of Am. v. Cuomo*, 141 S. Ct. 889 (2020) (Mem.); *Robinson v. Murphy*, 141 S. Ct. 972 (2020) (Mem.); *Harvest Rock Church, Inc. v. Newsom*, 141 S. Ct. 1289 (2021) (Mem.); *Gish v. Newsom*, 141 S. Ct. 1290 (2021) (Mem.); *Tandon v. Newsom*, 141 S. Ct. 1294 (2021) (per curiam); *Gateway City Church v. Newsom*, 141 S. Ct. 1460 (2021) (Mem.).

[15] *Raysor v. DeSantis*, 140 S. Ct. 2600 (2020) (Mem.); *Andino v. Middleton*, 141 S. Ct. 9 (2020) (Mem.); *Merrill v. People First of Alabama*, 141 S. Ct. 25 (2020) (Mem.); *Democratic Nat'l Comm. v. Wisconsin State Legislature*, 141 S. Ct. 28 (2020) (Mem.).

[16] *See, e.g.*, *Mitchell v. United States*, 140 S. Ct. 2624 (2020) (Mem.); *Lee v. Watson*, 141 S. Ct. 195 (2020) (Mem.); *Bernard v. United States*, 141 S. Ct. 504 (2020) (Mem.); *Bourgeois v. Watson*, 141 S. Ct. 507 (2020) (Mem.); *Johnson v. United States*, 141 S. Ct. 1233 (2021) (Mem.); *Johnson v. Rosen*, 141 S. Ct. 1233 (2021) (Mem.); *Montgomery v. Watson*, 141 S. Ct. 1232 (2021) (Mem.).

[17] *See Valentine v. Collier*, 141 S. Ct. 57 (2020) (Mem.); *see also Valentine v. Collier*, 140 S. Ct. 1598 (2020) (Mem.); *Barnes v. Ahlman*, 140 S. Ct. 2620 (2020) (Mem.).

deliberation. Two prominent examples of lawmaking through the shadow docket—changes made to make it harder to enforce the right to vote close to Election Day and to make it easier to obtain religious exemptions under the Free Exercise Clause—illustrate why it is so dangerous to use the shadow docket to formulate new legal rules.

II. *The Perils of Making Law Through the Shadow Docket*

A. *The* Purcell *Principle and the Unravelling of Voting Rights Remedies*

One of the most troubling developments involving the shadow docket in recent years is the Supreme Court's issuance of unsigned, and often unexplained, stay orders stopping courts from vindicating the right to vote close to an election. Through these cursory orders, decided in a rushed manner and without full briefing or oral argument, the Court has been rewriting the rules of our democracy, despite the obvious truth that there is no time when the right to vote is more important than when it is about to be exercised. Through these shadow docket orders, the Court has put an expiration date on our Constitution's promise of an inclusive, vibrant, multiracial democracy.[18]

By making it normal practice to stay lower court injunctions protecting the right to vote close to Election Day, the Court has frustrated the enforcement of the bedrock right to vote. Once a voter has been denied his or her constitutional right to cast a ballot, it is impossible to unring the bell. No later order can undo the denial of the right to vote for citizens whose votes have been suppressed.

Importantly, no legal principle commands the courts to shut the courthouse doors on voters when their right to vote matters most. The Roberts Court simply invented this doctrine out of whole cloth. Before John Roberts became Chief Justice, the Supreme Court granted remedies to individuals victimized by restrictive election rules even quite close to Election Day, taking careful account of both the right to vote and governmental interests in the orderly administration of elections.[19]

That all changed beginning in a 2006 shadow docket ruling in a case called *Purcell v. Gonzalez*,[20] which announced that federal courts should be wary of issuing injunctions in voting rights cases close to an election. "Court orders affecting elections, especially conflicting orders," the court's unsigned opinion explained, "can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase."[21] Since then, the Supreme Court has aggressively expanded what has been called the *Purcell* principle.[22] Now, in practice, the *Purcell* principle means that the courthouse doors must be bolted shut as Election Day nears. This effectively reduces the right to vote to a second-class right and inevitably harms marginalized and less-powerful citizens. If courts announce that they will essentially never intervene, they invite partisan manipulation of our democracy.

This dynamic played out repeatedly during the 2020 elections. In April 2020, in a 5–4 ruling in *Republican National Committee v. Democratic National Committee*,[23] the Supreme Court's conservative majority held that "courts should ordinarily not alter the election rules on the eve of an election," blocking an order designed to ensure that voters in Wisconsin did not have to sacrifice their health in order to vote.[24] Even the extraordinary

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[18] The discussion in this and the following paragraphs draws on David Gans, *The Roberts Court, The Shadow Docket, and the Unravelling of Voting Rights Remedies* (American Constitution Society, Oct. 2020), https://www.acslaw.org/wp-content/uploads/2020/10/Purcell-Voting-Rights-IB-Final-Version.pdf.

[19] *See, e.g.*, *Williams v. Rhodes*, 393 U.S. 23, 34 (1968); *McCarthy v. Briscoe*, 429 U.S. 1317, 1322-23 (1976) (Powell, J., Circuit Justice); C*lark v. Roemer*, 500 U.S. 646, 654 (1991).

[20] 549 U.S. 1 (2006) (per curiam).

[21] *Id.* at 4-5.

[22] *See* Richard L. Hasen, *Reining in the* Purcell *Principle*, 43 Fla. St. U.L. Rev. 427 (2016).

[23] 140 S. Ct. 1205 (2020) (per curiam).

[24] *Id.* at 1207.

circumstances in Wisconsin—thousands of voters would likely be disenfranchised because they had not received absentee ballots on a timely basis due to the COVID-19 pandemic, a public health crisis unparalleled in our lifetime—did not qualify for an exception from this so-called ordinary rule. The consequences were felt hardest in communities of color in cities such as Milwaukee, where only five polling places were open.[25] Justice Ruth Bader Ginsburg's plea that "[e]nsuring an opportunity for the people of Wisconsin to exercise their votes should be our paramount concern" went unheeded.[26]

In a string of unsigned, unexplained orders in the run-up to the 2020 election, the Supreme Court repeatedly refused to protect the right to vote during an election year. In a string of shadow docket orders in cases challenging voting or ballot access restrictions, the Court repeatedly sided with the states,[27] prompting Justice Sonia Sotomayor to take the Court to task for its pattern of repeatedly "condoning disfranchisement" and "forbid[ding] courts [from] mak[ing] voting safer during a pandemic."[28] The upshot is that *Purcell* has become an inflexible rule that sanctions voter suppression and prevents courts from playing their historic role in protecting constitutional rights.

The Court accomplished this jurisprudential reversal without a modicum of procedural regularity. The Supreme Court announced *Purcell* without full briefing and oral argument. It repeatedly applied *Purcell* in a string of cases that also lacked full briefing and argument. The Court's reasoning in these cases ranges from cursory to none. Given this, it is not surprising that the Roberts Court has not paid any attention to all the ways *Purcell* diverges from the Court's earlier case law that took as its touchstone the imperative of protecting the right to vote when it matters most. The *Purcell* principle has been developed without the sustained consideration and reflection necessary for proper judicial decision-making. Deciding major voting rights issues without time for proper consideration, argument, and reflection produces shoddy, error-ridden decisions that short-change the right to vote, one of our most cherished constitutional rights.

B. ***Religious Exemptions and COVID-19: Using the Shadow Docket to Redefine Religious Liberty***

The Free Exercise Clause of the First Amendment generally does not require that religious entities or persons who hold deeply held religious beliefs be exempted from neutral, generally applicable laws. This view, deeply rooted in the First Amendment's text and history,[29] has been the foundation of the Supreme Court's precedents in this area since the landmark case *Employment Division v. Smith* was decided more than thirty years ago.[30] This year, in a string of closely divided shadow docket orders, the Court repeatedly held that the Free Exercise Clause required a religious exemption from state laws that sought to prevent the spread of the COVID-19 virus. Through these shadow docket orders, the Court has made new law—what is known as the most favored nations theory of the Free Exercise Clause—that threatens to undermine *Smith*'s rule, mandating religious exemptions in what could prove to be a very significant range of cases. These shadow docket rulings are all the more significant because, in *Fulton v. City of Philadelphia*,[31] after full briefing, oral argument, and eight

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[25] Sherrilyn Ifill, *Never Forget Wisconsin*, Slate (Apr. 8, 2020), https://slate.com/news-and-politics/2020/04/never-forget-wisconsin.html.

[26] *Republican Nat'l Comm.*, 140 S. Ct. at 1211 (Ginsburg, J., dissenting).

[27] *Texas Democratic Party v. Abbott*, 140 S. Ct. 2015 (2020) (Mem.); *Raysor v. DeSantis*, 140 S. Ct. 2600 (2020) (Mem.); *Little v. Reclaim Idaho*, 140 S. Ct. 2616 (2020) (Mem.); *Andino v. Middleton*, 141 S. Ct. 9 (2020) (Mem.); *Merrill v. People First of Alabama*, 141 S. Ct. 25 (2020) (Mem.); *Democratic Nat'l Comm. v. Wisconsin State Legislature*, 141 S. Ct. 28 (2020) (Mem.); *Clarno v. People Not Politicians Oregon*, 141 S. Ct. 206 (2020) (Mem.).

[28] *Raysor*, 140 S. Ct. at 2603 (Sotomayor, J., dissenting).

[29] See Br. of First Amendment Scholars as *Amici Curiae* Supporting Respondents, *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021) (No. 19-123), 2020 WL 5027324, at *2 (arguing that "historical evidence does not support the view that individuals' Free Exercise rights entitle them to ignore neutral and generally applicable laws").

[30] 494 U.S. 872 (1990).

[31] 141 S. Ct. 1868 (2021).

months of deliberations, the Justices left *Smith*'s rule intact, refusing to overrule it. Although *Fulton* drew the lion's share of attention, the shadow docket rulings were the ones that truly broke new legal ground.

Importantly, in the spring and summer of 2020, the Supreme Court voted 5-4 to reject requests by churches in California and Nevada for a religious exemption from state restrictions on gatherings.[32] These orders were consistent with the general rule established in *Smith*. But following the death of Justice Ruth Bader Ginsburg and the confirmation of Justice Amy Coney Barrett, the Supreme Court repeatedly granted emergency applications to prevent enforcement of state COVID measures designed to protect the public health, mandating that churches and others be given religious exemptions from legal requirements.[33] Emergency injunctions pending appeal have long been considered an extraordinary form of relief—before the 2020 term, the Court did not issue any in the previous five years—but this past year, the Justices repeatedly granted them to plaintiffs seeking religious exemptions from state COVID orders.[34]

In these rulings that provided at best cursory analysis, the Supreme Court held that the Free Exercise Clause presumptively mandates a religious exemption where the government "treat[s] *any* comparable secular activity more favorably than religious exercise."[35] This is a huge doctrinal development. One commentator called this holding "[t]he most important free exercise decision since 1990."[36] The Court adopted it without full briefing, oral argument, or time for deliberation. This is a reckless way to make new law.

In *Tandon v. Newsom*, the April shadow docket ruling in which the Court adopted the broadest formulation of its new rule, the Court held that a pastor and congregant who wanted to perform in-home Bible services to large groups of people were entitled to a religious exemption from COVID regulations barring in-home gatherings in private residences involving three or more households. This did not involve discrimination against religion in any meaningful sense. Both secular and religious in-home gatherings alike were subject to the same rule. But the majority insisted that religious believers were entitled to more favorable treatment than their secular counterparts.[37]

The *Tandon* majority reasoned that a religious exemption was constitutionally required because some commercial businesses, such as hair salons and retail stores, were not subject to the three-household limit.[38] But the fact that California treated in-home gatherings differently from commercial businesses hardly demonstrated that the government was discriminating against religion.

This new view of what counts as discrimination against religion effectively means that, if the government exempts some secular activity, "it must place religious organizations in the favored or exempt category" unless

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[32] *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020) (Mem.); *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603 (2020) (Mem.).

[33] *See supra* note 14.

[34] *See Roman Catholic Diocese*, 141 S. Ct. at 75 (Roberts, C.J., dissenting); *id.* at 77 (Breyer, J., dissenting); Mark Joseph Stern, *The Supreme Court Broke Its Own Rules to Redefine Religious Liberty*, Slate (Apr. 12, 2021), https://slate.com/news-and-politics/2021/04/supreme-court-religious-liberty-covid-california.html.

[35] *Tandon*, 141 S. Ct. at 1296; *Roman Catholic Diocese*, 141 S. Ct. at 66-67; *id.* at 69 (Gorsuch, J., concurring); *id.* at 73 (Kavanaugh, J., concurring); *S. Bay Pentecostal*, 141 S. Ct. at 718-19 (statement of Gorsuch, J.).

[36] Jim Oleske, Tandon *Steals* Fulton*'s Thunder*, SCOTUSblog (Apr. 15, 2021), https://www.scotusblog.com/2021/04/tandon-steals-fultons-thunder-the-most-important-free-exercise-decision-since-1990/.

[37] *Tandon*, 141 S. Ct. at 1298 (Kagan, J., dissenting); *see also Roman Catholic Diocese*, 141 S. Ct. at 80 (Sotomayor, J., dissenting) (criticizing Court's order granting a religious exemption even though "New York treats houses of worship far more favorably than their secular comparators").

[38] *Tandon*, 141 S. Ct. at 1297 (stressing that "California treats some comparable secular activities more favorably than at-home religious exercise, permitting hair salons, retail stores, personal care services, movie theaters, private suites at sporting events and concerts, and indoor restaurants to bring together more than three households at a time").

the law can survive strict scrutiny.[39] In other words, religious entities enjoy "something analogous to most-favored nation status."[40] This is potentially an incredibly sweeping rule, one that could effectively gut *Smith*. As Douglas Laycock put it, "[i]f a law with even a few secular exceptions isn't neutral and generally applicable, then not many laws are."[41]

Using the emergency orders process to undermine an important and longstanding decision of the Supreme Court is deeply troubling. The Supreme Court's legitimacy depends on its commitment to transparency, procedural regularity, and fairness. Its increasing willingness to use the shadow docket to make new law that affects the rights and responsibilities of millions of people in decisions that are rushed and communicate little or no reasoning to the public erodes our system of justice.

III. ***Conclusion***

The Supreme Court's authority and legitimacy depend on providing reasoned explanations of what the Constitution and federal law require. The shadow docket, particularly in the expansive form it occupies today, undermines this essential function. In addition to exploring the ways in which the Court's recent emergency order ruling with respect to Texas's S.B. 8 offends key constitutional rights and harms members of our national family, the Committee should also examine ways to bring the shadow docket into the light and shrink the outsized role it currently plays. This is not simply about process—though process is indeed vital to a justice system that is meant to be open to all and aims to be perceived as fair and equitable. Rather, what we have seen recently suggests that the use of the shadow docket tends to produce substantive results that privilege certain interests over others, that work against democratic participation instead of for it, and that further disempower already marginalized people. Congress and the American public can ignore this problem no longer.

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[39] *Calvary Chapel*, 140 S. Ct. at 2612 (Kavanaugh, J., dissenting); *Roman Catholic Diocese*, 141 S. Ct. at 73 (Kavanaugh, J., concurring).

[40] *Calvary Chapel*, 140 S. Ct. at 2612 (Kavanaugh, J., dissenting) (quoting Douglas Laycock, *The Remnants of Free Exercise*, 1990 S. Ct. Rev. 1, 49-50 (1990)).

[41] Douglas Laycock, *The Broader Implications of* Masterpiece Cakeshop, 2019 B.Y.U. L. Rev. 167, 173 (2019).

Deeds
Not Words

Attn: The Honorable Sen Durbin, Chair
224 Dirksen Senate Office Building
Washington, DC 20510

Re: Written testimony; A State of Crisis: Examining the Urgent Need to Protect and Expand Abortion Rights and Access/ SB8

Dear Sen. Durbin and Members of the US Senate Judiciary Committee,

My name is Genevieve Villa and I am a student at The University of Texas at El Paso and a #changemaker with Deeds Not Words, a Texas organization that galvanizes the power of young people through policy making, art, organizing and voting.

I am here to oppose the SB8 bill that is impacting Texans. For those that menstruate and have irregular cycles, health conditions, stress, or any other factors that could cause a missed period, oftentimes do not know they are pregnant by the time they hit 6 weeks, therefore many do not have enough time to be able to make a decision before then.

In El Paso, there is currently only 1 Planned parenthood clinic, If you have your abortion in Texas, you must receive a sonogram and pregnancy options counseling before you can have an abortion, and these must be done at the same clinic where you will have your abortion. Texas law requires that if you have your abortion in Texas, you must receive parental consent or get a judicial bypass, and thankfully our friends at JDP exist to help our youth. Near El Paso, there is only one clinic that does not require parental consent or notification, and that clinic is in Santa Teresa, NM. In the worst case scenario, we can consider a patient who is undocumented and under the age of 18, where without the passing of SB 8, access to a safe abortion would be virtually impossible. Now, with a 6-week ban rooted in white supremacy, even the

most privileged have to experience these restrictions on abortions. And unfortunately, we exist in a world where change only happens when the privileged are affected.

The fact that a person cannot choose for themselves whether or not to have an abortion after a traumatic event, such as rape, is a violence of their freedom of choice. Those who live under the poverty line and cannot afford to bring children into the world, especially in a state that supports companies that do not provide pregnancy prevention in their health care plans, should not be forced to continue with these pregnancies. These children will have to be brought up in poverty and most will not have access to opportunities to be able to become successful as adults. This bill was not created in the best interest of parents or their children.

I fear for the future of my children to live in a state that wants to control their reproductive choices. If my children face an unexpected pregnancy, they will be unable to make a choice for themselves and are statistically, less likely to continue their higher education goals. A pregnancy is a life changing experience and people should not be forced into a decision like this especially for those at an age where they are unable to consent to their own bodily decisions because of parental consent laws in Texas

We are now silenced when it comes to our reproductive rights. Rights that have to do with our own bodies. There are no other bills out there that force a person into a decision of this magnitude-- It seems to be another way to marginalize women. I would like to conclude by thanking you for your time and giving me the opportunity to submit a written testimony before you today, and I hope that this committee take action to stop Texas's law: SB8.

Andrea Reyes, Political Director at Deeds Not Words
andrea@deedsnotwords.com
Deeds Action Fund is the 501(c)(4) political arm of Deeds Not Words, a non-profit organization dedicated to standing for gender equity in Texas..

Testimony on SB8

Texas Law Chapter of If/When/How

My name is Gloria Jones, I live in Austin, Texas, and I am writing to testify on behalf of the If/When/How chapter at The University of Texas School of Law. We, the students of If/When/How, vehemently oppose the Texas Legislature's recent steps to erase the constitutional right to abortion. Many of us have a personal stake in fighting these vile restrictions. As Texans, it has restricted our ability to access reproductive healthcare and make important, private healthcare decisions. As advocates, it has censored us and our support for reproductive rights. As women and childbearing folks, it has reinforced the belief that we are undeserving of the dignity and humanity inherent in maintaining bodily autonomy. And as law students, future lawyers, and future legal scholars, it has weakened our trust in the rule of law. Those at the Texas Legislature, merely blocks from our campus, should be serving as role models of legal integrity. But, rather than using the law to protect the Constitution and serve the people they are sworn to represent, they have used the force of law in a self-serving stunt to impose their own morality on all Texans through a system of vigilante enforcement. Condoning legislation such as this sets a dangerous precedent that state legislatures do not answer to the U.S. Constitution and will not be held accountable, even when they openly strip half the population of their constitutional rights.

We particularly wish to highlight the following points:

(1) SB8 allows anybody in the United States to bring vigilante lawsuits without requiring they be personally affected, imposing no repercussions for meritless claims, and encouraging frivolous suits, contrary to basic policy goals of the court and litigation.
(2) SB8's scope is purposefully undefined; without limits on its application, it is likely to impose First Amendment infringements.
(3) SB8 forces survivors of rape and incest to carry pregnancies to term and give birth, even minors, which, in 2016, the United Nation's Human Rights Council identified as tantamount to torture.
(4) SB8 has already caused clinic closures in Texas and overcrowding in out-of-state abortion clinics, placing a substantial burden on non-Texans seeking abortions in those states.
(5) SB8 disproportionately impacts People of Color, people with low-socioeconomic statuses, people under 18, and people in the immigration system.

We urge you to listen to the voices of Texans who are on-the-ground working to preserve reproductive healthcare access, and we ask you to see SB8 as the human rights violation that it is and help us in challenging unconstitutional, inhumane abortion restrictions. Thank you.

September 29, 2021

Senator Dick Durbin
Chair, Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

Senator Chuck Grassley
Ranking Member, Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Durbin and Ranking Member Grassley:

We applaud you for investigating the Supreme Court's process for handling emergency cases, called a "shadow docket." Our organizations are committed to a transparent, accountable, and independent judiciary, and are concerned that the shadow docket is a significant obstacle to those goals.

As the Senate Judiciary Committee examines this important issue, we urge its members to consider that the Supreme Court's use of the shadow docket is a systemic issue with consequences that extend beyond any single case. The two defining characteristics of shadow docket cases are that the parties do not provide full briefing and argument in advance, and the resulting opinions are frequently unsigned and often contain little or no explanation of the Court's reasoning. The apparently ad hoc nature of this decision-making is in stark contrast with the bulk of the Court's work. The Court's lack of transparency in its decision-making ultimately undermines its actual and perceived legitimacy, and should concern everyone.

The Court has increasingly relied on the shadow docket to resolve complex cases with significant impacts on the rights of millions of people — all without full briefing, oral argument, or often even explanation of the reasoning behind the order.[1] Through the shadow docket, the Court has often granted or removed stays, overruling lower courts that acted based on more complete information, or taken up cases that have not yet been decided by the lower courts. It has done so

[1] *The Supreme Court's Shadow Docket: Hearing before the House Judiciary Subcommittee on the Courts, Intellectual Property, and the Internet*, February 18, 2021 (testimony of Stephen Vladeck), 5. https://www.justsecurity.org/wp-content/uploads/2021/02/Vladeck-Shadow-Docket-Testimony-02-18-2021.pdf.

even in capital cases that then resulted in the deaths of federal prisoners whose executions were stayed by lower courts.[2]

One of our organizations, the Project On Government Oversight, recently convened a group of former state and federal judges and a leading judicial scholar to study ways to ensure the impartiality and legitimacy of the Supreme Court. A copy of their report accompanies this letter. They concluded that the shadow docket was a cause for concern, noting:

> we need the disciplined development of precedent to guide future decisions, as well as disciplined procedure to produce that law. Adhering to the process of full briefing and arguments and publication is an important facet of this obligation, and the departure from these practices is worrisome.[3]

The Court should dispense with this unpredictable process, which can lead to under-informed and premature decision-making. At minimum, the Court should be required to disclose which justices joined the majority or dissented from shadow docket orders, and each decision should come with a written explanation of the majority's reasoning, just as merits case opinions do. In addition, these opinions should be more prominently displayed on the Supreme Court's website, so that members of the public can readily access them.[4] Finally, if a shadow docket petition presents an exceptionally pressing or novel issue, the Court should consider granting oral argument, even if the petition is submitted during the Court's summer recess. As we've learned over the last year and a half, justices can quite easily participate in oral argument without physically being at One First Street. These measures will benefit the public and the Court itself, regardless of the majority's ideological leanings or the specific case at issue.

It is important to recognize that the shadow docket is just one part of a larger problem with a lack of transparency at the Supreme Court. For instance, the public still lacks guaranteed real-time electronic access to the Court's oral arguments. The pandemic-era practice of streaming live audio of the arguments has been enormously popular and informative, but the Court has not committed to continuing that practice, let alone allowing video coverage. In addition, the justices' financial disclosures are less thorough than most other government officials', and the justices are not bound by a formal code of ethics, unlike other federal judges. And the Supreme Court does not have to go through the same public process when creating its rules of procedure that other federal courts do.

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[2] Two January 2021 capital cases in which the Court vacated stays of execution ordered by circuit courts, without explanation, are examples of this practice. In U.S. v. Higgs, the Court reversed a stay before the circuit court had ruled on the merits of the case, granting "cert before judgment." U.S. v. Higgs, 592 U.S. ___ (2021); Rosen v. Montgomery, No. 20A122 (2021) (order granting vacatur), https://www.supremecourt.gov/orders/courtorders/011221zr1_f2ag.pdf.

[3] Task Force on Federal Judicial Selection, *Above the Fray: Changing the Stakes of Supreme Court Selection and Enhancing Legitimacy*, Project On Government Oversight, July 8, 2021, 18, https://docs.pogo.org/report/2021/Above_the_Fray_Report_2021-07-08.pdf.

[4] Gabe Roth and Tyler Cooper, "The Shadow Docket: Problems and Solutions," Fix the Court, February 18, 2021, https://fixthecourt.com/2021/02/shadow-docket-problems-solutions/; Task Force on Federal Judicial Selection, *Above the Fray*, 18 [see note 3].

As Fix the Court recently observed, "The Court's power is derived entirely from its perceived legitimacy, and yet time and time again it's declined to show the public that this legitimacy is deserved."[5] We thank the committee for examining how to help the Court become more transparent and, as a result, more legitimate. Doing so will benefit the Court and the country.

Sincerely,

Sarah Turberville
Director
The Constitution Project at the Project On Government Oversight

Gabe Roth
Executive Director
Fix the Court

Enclosure: 1

cc: Members of the Senate Judiciary Committee

[5] Roth and Cooper, "The Shadow Docket: Problems and Solutions" [see note 4].

United States Senate
Committee on the Judiciary

Hearing:
Texas's Unconstitutional Abortion Ban and the Role of the Shadow Docket

Testimony Submitted for the Record by LGBTQ Organizations

September 29, 2021
Washington, DC

Dear Chairman Durbin, Ranking Member Grassley, and Members of the Committee:

I. Our Fundamental Rights Are in Jeopardy

As organizations committed to the equal dignity of all persons, including the right to make our own personal decisions regarding our health and our families, we submit this testimony addressing the alarming erosion of the right to essential reproductive health care.

Access to comprehensive reproductive health care is essential to people's health, well-being, and ability to participate equally in their communities. The U.S. Supreme Court has repeatedly affirmed that abortion is a fundamental right and that undue burdens on access violate the Constitution; the Court's recent failure to halt the outrageous Texas abortion ban known as SB 8 is deeply alarming.

Anti-abortion politicians continue to push increasingly extreme and harmful laws that single out abortion care for restrictions that do not apply to similar health care. These laws, often presented under the guise of being health and safety regulations, are intended to restrict or eliminate access to abortion and do nothing to protect patient well-being. Denial of abortion care can have serious long-lasting consequences on a person's health and well-being, including increasing the risk of experiencing poverty, physical health impairments, and intimate partner violence.[1] Abortion is one of the safest medical procedures in the United States,[2] and should not be singled out and treated differently from other health care, particularly through restrictions that have no medical value and do nothing to benefit the health or safety of the pregnant person.

The organizations submitting this testimony are keenly aware of how specious health and safety rationales with no real scientific basis have been used to undermine the basic rights of unpopular minorities and other powerless communities. Pseudoscientific arguments have been used against: Black and Brown people (to support, for example, anti-miscegenation laws); women (to bolster restrictions on educational and employment opportunities); and LGBTQ people (to justify forced sterilization, involuntary institutionalization, and the denial of custody and marriage rights). The disingenuous "health and safety" claims used to advance the litany of abortion restrictions enacted by states in recent years are no different. With public opinion holding steady against banning abortion, anti-abortion forces have increasingly framed restrictions on the procedure as being in women's best interest. They ignore the medical

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[1] Foster DG, Ralph LJ, Biggs MA, Gerdts C, Roberts SCM, Glymour MA. "Socioeconomic outcomes of women who receive and women who are denied wanted abortions. American Journal of Public Health." (2018) Mar; 108(3):407-413. Advancing New Standards in Reproductive Health. "Turnaway Study: Long-term study shows that restricting abortion harms women." Bixby Center for Global Reproductive Health. Retrieved from: https://www.ansirh.org/sites/default/files/publications/files/turnaway_study_brief_web.pdf.

[2] National Academies of Science, Engineering & Medicine, *The Safety and Quality of Abortion Care in the United States*, 1-16 (2018).

evidence of its safety and enact requirements that do nothing to bolster that safety, while making it difficult if not impossible for providers to keep their doors open. Texas has taken this virulent opposition to the autonomy of pregnant people to jaw-dropping heights by enacting a shocking bounty system that incentivizes perfect strangers to file lawsuits against anyone assisting someone in obtaining an abortion. The alarm bells are ringing loudly – those in favor of forced pregnancy are energized and emboldened. We must respond with equal vigor.

II. Why the LGBTQ Community Supports Access to Abortion Care

Our organizations, representing millions of LGBTQ people across this country, support access to the full range of reproductive health care, including abortion, which is vital to the health, safety and lives of the members of our diverse communities. We know that the harm from the erosion of reproductive rights will fall hardest on those who are already marginalized in our society: Black and Brown women and non-binary and transgender people.

First, many sexual minority women and queer-identified and transgender people can and do become pregnant, and some will need abortion care if they face an unwanted pregnancy. Pregnancy is a common experience among women of all sexual identities—not just those who are heterosexual. More than 80 percent of bisexual women have experienced at least one pregnancy, and more than a third of lesbians have done so.[3] In addition, "a substantial proportion of [transgender and gender-expansive] individuals who were assigned female sex at birth may need pregnancy and/or abortion care during their lives."[4] Similarly, due in part to higher rates of sexual victimization, sexual minority women are at least as likely as heterosexual women to experience unintended pregnancies.[5] Sexual minority women are more likely than other women to experience unwanted pregnancies caused by sexual violence. Among abortion patients, sexual minority women are significantly more likely than their heterosexual counterparts to experience physical or sexual violence, "sometimes by a factor of 15 or more."[6] Transgender and nonbinary individuals also experience very high rates of sexual violence and assault, with the attendant risk of unwanted pregnancies.[7]

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[3] Barbara G. Valanis et al., Sexual Orientation and Health: Comparisons in the Women's Health Initiative Sample, ARCHIVES OF FAMILY MED., Sept.–Oct. 2000, at 843, 843 (abstract).
[4] Heidi Moseson et al., Abortion Experiences of Transgender, Nonbinary, and Gender-Expansive People in the United States, 224 AM. J. OBSTETRICS & GYNECOLOGY 376, 376 (2021).
[5] Caroline Sten Hartnett et. al., Congruence Across Sexual Orientation Dimensions and Risk for Unintended Pregnancy Among Adult U.S. Women, 27 WOMEN'S HEALTH ISSUES 145, 145 (2017) (finding that unintended pregnancies are at least as common for sexual minority women as for heterosexual women); Bethany G. Everett et al., Sexual Orientation Disparities in Mistimed and Unwanted Pregnancy Among Adult Women, PERSPECTIVES ON SEXUAL AND REPRODUCTIVE HEALTH, Sept. 2017, at 157, 161-62 (finding that adult and adolescent sexual minority women are at greater risk of unintended pregnancy than are their heterosexual counterparts).
[6] Rachel K. Jones et al., Sexual Orientation and Exposure to Violence Among U.S. Patients Undergoing Abortion, OBSTET. & GYNECOL., Sept. 2018 at 605, 609.
[7] Dep't of Justice, Office for Victims of Crime, *Responding to Transgender Victims of Sexual Assault: The Numbers* (2014); Michelle M. Johns et al., Centers for Disease Control and Prevention, *Transgender Identity and Experiences*

Second, many abortion and family planning clinics have expanded their services to include cancer and STI screening and various wellness services, and they have become trusted providers of reproductive and other medical care to the LGBTQ community. Many queer people, and especially those who are transgender, avoid medical care based on legitimate fears of being turned away or facing discrimination and ignorance. Members of the LGBTQ community have historically struggled to access basic health care because of stigma arising from social and political beliefs about sex, gender roles, and childbearing. This stigma has led the LGBTQ population to experience significant health disparities compared to other populations.[8] In response, many clinics that provide abortion and other reproductive health services now offer affirming, judgment-free care to members of this community, providing critical medical services for those who would otherwise go without. The LGBTQ community looks to these clinics to provide contraception and abortion services, as well as wellness services, examinations, STI testing and treatment, hormone replacement therapy, and insemination services. These clinics provide these healthcare services in a safe, nurturing, and affirming environment—free from the discrimination and mistreatment often faced by LGBTQ individuals in the larger health care system. When these essential sites of care are forced to close because of the proliferation of specious health and safety regulations designed to thwart abortion access, it is not only abortion care that is lost.

Third, the movements for reproductive freedom and LGBTQ equality share deeply linked interests and concerns. We are all seeking control over our own bodies – the freedom to decide whether to become or remain pregnant, whether and with whom to have intimate relationships, and whether to seek medical care to help our bodies align with our gender identities. We seek the freedom to form our families on our own terms – to partner with and marry whom we love, to have children or not, and to live as our true selves as determined by us, not by someone else.

Fourth, abortion restrictions are a form of sex discrimination, a persistent scourge that harms all women, including LBTQ women, as well as non-binary people and GBTQ men. Discrimination based on sex often occurs because of a desire to retain rigid and outdated gender roles that dictate how one should behave, who someone should love, and one's role in the family, economy and society. It is one of the animating forces behind restrictions on abortion – those

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of Violence Victimization, Substance Use, Suicide Risk, and Sexual Risk Behaviors Among High School Students—19 States and Large Urban School Districts, 2017, Morbidity and Mortality Weekly Report, Jan.25, 2019, at 67, 68-69.

[8] The National Institutes of Health formally designated sexual and gender minorities as a health disparity population in 2016. See Director's Message, "Sexual and Gender Minorities Formally Designated as a Health Disparity Population for Research Purposes," Oct. 6, 2016, https://www.nimhd.nih.gov/about/directors-corner/messages/message_10-06-16.html; *see also* National Academies of Sciences, Engineering, and Medicine. 2020. Understanding the Well-Being of LGBTQI+ Populations. Washington, DC: The National Academies Press. https://doi.org/10.17226/25877.

who would remove from women[9] the ability to determine whether to continue a pregnancy believe that bearing a child should be that woman's primary, or even only, priority.

Like anti-LGBTQ discrimination, abortion bans discriminate based on sex. In *Bostock v. Clayton County*, the U.S. Supreme Court held that discrimination because of a person's sexual orientation or transgender status necessarily discriminates based on sex.[10] Because being LGBTQ is a sex-based trait, "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."[11]

By the same logic, laws that restrict abortion also facially discriminate based on sex. Like being LGBTQ, pregnancy is a sex-based characteristic; it is "inextricably bound up with" an individual's sex.[12] Accordingly, laws that force a pregnant woman to bear a child necessarily discriminate based on sex, as would a law that barred a reproductive medical procedure available only to men. For example, if a state barred men from obtaining vasectomies, such a law would discriminate based on sex and would be upheld only if the state could show "an exceedingly persuasive justification."[13] The LGBTQ community is invested in ensuring that no forms of sex discrimination – including those that seek to deprive pregnant people of their agency – become or remain enshrined in our laws.

Finally, our community has a deep interest in exposing the false premise upon which these politically-motivated abortion restrictions are based. As noted above, appeals to public health and safety have often been invoked by policymakers seeking to limit the rights and freedoms of disfavored groups. In the early twentieth century, laws based on pseudoscience authorized the sterilization, forced commitment, deportation and criminal prosecution of LGBTQ people, as well as bans on their public employment. Even after homosexuality was formally de-pathologized in the early 1970s, states continued to cite dubious science in denying marriage equality and parenting rights to LGBTQ people. Today, we are witnessing cruel attempts by state legislators to bar medical professionals from providing care to transgender youth, despite the overwhelming consensus of the medical profession that such care is medically necessary.

The policymakers pushing restriction after restriction on abortion care similarly ignore the evidence of the safety of abortion and the informed opinion of the medical profession when they enact sham "health and safety" measures that they claim protect patients but in fact do the opposite by reducing access. This unending stream of legislative proposals introduced by extremist lawmakers – from abortion restrictions to barring transgender youth from receiving essential health care – distorts science and coopts medicine in pursuit of an ideological agenda

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[9] While not all people with the capacity for pregnancy are women, the vast majority do identify as women and for purposes of addressing sex discrimination it is necessary to recognize the fact that abortion restrictions target women in part out of a desire to force them into childbearing roles, traditionally seen as the purview of women.
[10] 140 S. Ct. 1731, 1737 (2020).
[11] *Id*. at 1741.
[12] *Id*. at 1742; *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 733 n.6 (2003) (a "pregnancy disability leave" that is not based on gender-neutral medical criteria is a "gender-discriminatory policy").
[13] *United States v. Virginia*, 518 U.S. 515, 531 (1996).

that denies to individuals the ability to live as their true selves and make their own decisions regarding childbearing and family formation. As they have done in the past, these policymakers wrap themselves in the language of pseudoscience to disguise animus as concern for health and safety.

III. Congress Must Act

Our constitutional rights and ability to access comprehensive health care should not depend on our zip codes. We are thrilled that the House of Representatives last week passed the Women's Health Protection Act, which establishes a statutory right for health care providers to provide, and their patients to receive, abortion care without medically unnecessary restrictions, limitations, and bans that single out abortion and impede access to care. The bill would put a stop to these harmful restrictions and bans, and it would protect the right to access abortion care for all, no matter where someone happens to live. We urge the Senate to take up and pass the Women's Health Protection Act and send it to President Biden's desk.

We commend this committee for holding a hearing on this critical issue.

Sincerely,

National Center for Lesbian Rights
Athlete Ally
Bay Area Lawyers for Individual Freedom
Equality California
GLBTQ Legal Advocates & Defenders
Human Rights Campaign
Lambda Legal
LPAC Action Network
Mazzoni Center
National Black Justice Coalition
National LGBTQ Task Force Action Fund
Queer and Trans Abortion Storytellers of We Testify
SIECUS: Sex Ed for Social Change
Whitman-Walker Institute
Woodhull Freedom Foundation

Deeds
Not Words

Attn: The Honorable Sen Durbin, Chair
224 Dirksen Senate Office Building
Washington, DC 20510

Re: Written testimony; A State of Crisis: Examining the Urgent Need to Protect and Expand Abortion Rights and Access/ SB8

Chair Durbin and Senate Committee on the Judiciary,

My name is Natalie Leyva, and I am a Senior at Prairie View A&M University and campus organizer with Deeds Not Words, an organization that galvanizes the power of young people through policy making, art, organizing and voting. I am here in support of accessible and legal abortion because I want to have children one day. I want to be the best mother that I can be when that time comes.

My friend was 17 when she had an abortion. There was a lot of confusion and fear as to what was happening to her body. She was feeling like an impostor in her own body. Things were changing, and they were changing quickly. There wasn't any sex education that she could refer to, nor was there the ability to be financially supportive.

The choice of having an abortion allowed her to live the rest of her life while still growing to be who she wanted to be. If she were to get an abortion today, her options would be limited. She would fear for her life, and I would fear for hers too.

These now restrictive practices put in place will only lead to more dangerous procedures to be taken in the current day. These choices are not easily made, but they are quickly taken away when there is no choice.

SB8 is important because it showcases just how far the Texas legislature will go to ensure that our body is not our own. This law only creates more barriers

and more problems to an already complex situation. These restrictions that are in place due to SB8 will not allow me and countless others to choose— but is it a choice if you can't decide?

I want to emphasize that having an abortion is a hard decision to make, and ultimately getting rid of that option is a violation of human rights. Isn't there a guarantee of life, liberty, and the pursuit of happiness stated in the Declaration of Independence?

Our rights mustn't be limited by those who will never have to think about having an abortion. The ability to choose must be accessible and legal. Otherwise, the Texas legislature will be more than just responsible for people's livelihoods, but their deaths as well.

Should you have any questions, contact:

Andrea Reyes, Political Director at Deeds Not Words
andrea@deedsnotwords.com
Deeds Not Words a 501(c)(3) is a non-profit organization dedicated to standing for gender equity in Texas.

Statement for the Record from
Planned Parenthood Federation of America and Planned Parenthood Action Fund

United States Senate Committee on the Judiciary Hearing Entitled
"Texas's Unconstitutional Abortion Ban and the Role of the Shadow Docket"

September 29, 2021

Planned Parenthood Federation of America ("Planned Parenthood") and Planned Parenthood Action Fund ("the Action Fund") submit these comments for the U.S. Senate Committee on the Judiciary, hearing entitled "Texas's Unconstitutional Abortion Ban and the Role of the Shadow Docket" held on September 29, 2021.

Planned Parenthood is a leading provider of high-quality, affordable health care and the nation's largest provider of sex education. With more than 600 health centers across the country, Planned Parenthood health centers provide affordable birth control, vaccinations, lifesaving cancer screenings, testing and treatment for sexually transmitted infections, HIV screenings, and other essential care to 2.4 million patients each year. Planned Parenthood's health centers are critical for many underserved communities, specifically communities of color and communities with low-incomes, facing limited access to reliable and affordable health care due to systemic barriers and discrimination.

We are seeing a surge of abortion restrictions sweeping the country. State lawmakers, emboldened by the new makeup of the Supreme Court and the more than 230 federal judges appointed during the Trump administration, are rushing to control the rights and freedoms of pregnant people. Texas's extremist S.B. 8 law, an unconstitutional six-week ban on abortion, is not an isolated example. It's part of a coordinated attack at the state level to restrict access to safe, legal abortion.

The 2021 state legislative season was the most hostile for reproductive health and rights since *Roe* was decided. According to the Guttmacher Institute, nearly 600 abortion restrictions in 47 states have been introduced this year alone, and 97 of those have been enacted. This already far surpasses 2011 — previously the worst year on record — when 89 restrictions were enacted. But while these attacks are accelerating, they are not new. State legislatures have enacted over 1,320 restrictions in the 48 years since *Roe* was decided, including 580 restrictions enacted since 2011. By July 1 of this year, 8 states had enacted 11 abortion bans, including near-total

bans in both Arkansas and Oklahoma; six week bans in Idaho, Oklahoma, South Carolina, and Texas; and reason-based bans in South Dakota and Arizona.

S.B 8 bans abortion as early as six weeks into pregnancy in Texas, before many people even know they're pregnant. Approximately 85 to 90 percent of people who obtain abortions in Texas are at least six weeks into pregnancy, meaning this law has decimated abortion access in the state. The impact is felt largely by Black, Latino and Indigenous people, those with low incomes, and people in rural areas — who have long faced barriers to abortion access.

Right now, the vast majority of people in Texas seeking an abortion are being denied the care they need. Patients are being forced to travel out of state to get an abortion or, if they are unable to travel, carry pregnancies to term against their will. According to a report from the Guttmacher Institute, Texas patients will now have to travel 20 times farther to get an abortion — increasing driving times an average of 3.5 hours each way. The Texas Policy Evaluation Project also estimates that as many of 46% of people seeking abortions in Texans will carry their pregnancies to term against their will.

Already, people who struggle to make ends meet are often forced to delay abortion services because they need time to secure the funds. Women who have abortions are disproportionately low-income, young, Black and Latina. In 2014, 75% of abortions were among low-income patients, and 64% were among black women or Latinas. In Texas, due to decades of racist economic policies, the poverty rate for Black women and Latinas is disproportionately high, meaning they will be most impacted by this ban. The poverty rate among Black women in Texas is 19%, and is 20% for Latinas. In Texas, 37% of female-headed households live in poverty. Many Texans are now not able to access abortion unless they can afford to travel hundreds of miles out of state, take time off work, and arrange child care, transportation, and lodging.

For some, cost is just one barrier; immigration status and checkpoint concerns may also inhibit travel. In South Texas, Latino communities and immigrants already face disproportionate barriers to abortion due to long distances, travel restrictions, and border patrol checkpoints scattered along the 100-mile U.S.-Mexico border region. For undocumented women in the region, crossing an inland border patrol checkpoint to get an abortion poses the risk of deportation. Pregnant Texans may also be forced to carry pregnancies to term against their will at risk of their health, in a state with one of the worst maternal mortality rates in the country. Because of structural racism in the maternal health care system and the state's lack of investment in social supports to help Black women and birthing people thrive, they are at a greater risk of dying or suffering severe complications during pregnancy, birth, and the postpartum period.

This law has isolated people seeking abortion — targeting their entire support network and discouraging their loved ones from helping them for fear of being sued. Patients may be scared to have an open conversation about their decision to have an abortion for fear of putting a loved one or other trusted person in legal jeopardy. In 2020, Gov. Abbot's COVID-19 executive order,

which banned abortion for nearly a month, showed what an abortion ban could look like for Texans. People were desperate as hundreds of appointments were canceled all over the state.

Although S.B. 8 is a Texas law, the negative effects are rippling throughout the entire country. Since the draconian law has taken effect, and in the days leading up to its effective date, Planned Parenthood of Rocky Mountains (PPRM)'s health centers have seen a significant spike in the percentage of patients traveling from Texas seeking abortions at their health centers in New Mexico and Colorado. On average, the Texas patients that PPRM has seen since S.B. 8 went into effect have traveled approximately 650 miles (one way) to access abortion out of state.

Planned Parenthood Great Plains and Planned Parenthood of Arkansas & Eastern Oklahoma's health centers have also witnessed the devastating effect S.B. 8 has had on Texans and their ability to access abortion. The surge of Texans seeking abortions in their Oklahoma health centers since September 1 is unprecedented, and the demand only continues to grow. These demands are causing schedules to become extremely backlogged and there are significant fears from staff that the health center will not be able to continue to serve their existing patient population in Oklahoma in a timely manner given the overflow of patients coming from Texas.

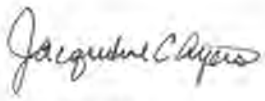
It is not just the states geographically touching Texas either — a southern Illinois Planned Parenthood health care center has served patients from Arkansas, Louisiana, Kentucky, Tennessee, and Texas. Patients are driving over twelve hours to access the health care they need — adding additional barriers such as finding child care, paying long-distance gas mileage, and overnight hotel stays. The damage of the Texas law will only continue to spread as the backlog continues. The consequences of this will have severe impacts on patient's lives, forcing them to seek abortions later in pregnancy — which are more restricted and expensive, pressure patients in the surrounding states to scramble to seek care in other states farther away. Many pregnant people without the resources will be forced to carry unwanted pregnancies to term. This extreme law burdens patients seeking the health care they need and the providers, some who are the only providers at their health centers.

Twenty-six states are poised to move to ban abortion if *Roe v. Wade* were overturned. Today, nearly 90% of American counties are without a single abortion provider, and 27 cities have become "abortion deserts," because people who live there must travel 100 miles or more to reach a provider. There are currently five states with only one abortion provider. 80% of the American public supports legal abortion and there is no state where outlawing abortion is popular.

For many people — especially immigrants, Black, and Latino communities — abortion is already a right in name only and S.B. 8 has decimated what little access remained. No one is free unless they have control of their own body and future. Every single person deserves access to sexual and reproductive health care, no matter their income, state of residence, zip code, or immigration status. Abortion is normal — nearly one in four women will have an abortion in her lifetime. Abortion is health care. And no one should take the right to access that health care

away from you. We must protect safe, legal abortion for anyone no matter how much money they have, where they live, or whether they have insurance.

Sincerely,



Jacqueline Ayers
Senior Vice President of Policy, Campaigns, and Advocacy
Planned Parenthood Federation of America
Planned Parenthood Action Fund
1110 Vermont Avenue NW, Suite 300
Washington, DC 20005

Physicians for Reproductive Health
Testimony for the Record
Hearing on Texas's Unconstitutional Abortion Ban and the Role of the Shadow Docket
Senate Committee on the Judiciary
September 29, 2021

Physicians for Reproductive Health (PRH) is a physician-led organization that mobilizes and organizes medical providers to advance sexual and reproductive health, rights, and justice. Our network includes physicians of all specialties from across the country committed to ensuring access to equitable, comprehensive health care, that will always include abortion care. We believe this work is necessary for all people to live freely with dignity, safety, and security.

We write to express our gratitude for this hearing on the Supreme Court's shadow docket, the harms of laws like Texas's S.B. 8, and the need to protect and expand abortion rights and access. We also wish to outline for the Committee the importance of protections around abortion access for our communities and the danger to patients when abortion care is pushed out of reach. Whether our patients are ready to build or create their family, already parenting, or have decided not to continue a pregnancy, all of them share something in common – they are making thoughtful, decisions about their health and well-being. Each of them deserves access to high quality health care that includes abortion care, regardless of who they are, their income levels, and regardless of where they live.

Equal access to abortion care is essential for the health, well-being, security, and dignity of all people. Abortion is a right, protected by the U.S. Constitution and repeatedly affirmed by the Supreme Court – most recently in 2020 – that the Constitution's guarantees of privacy and liberty protect a person's right to end a pregnancy. Yet, despite nearly fifty years of Supreme Court precedent, the Court is poised to hear *Dobbs v. Jackson Women's Health Organization*, a case directly challenging *Roe v. Wade's* protections. Notably, over 200 members of Congress, including members of the Senate Judiciary Committee, filed amicus briefs urging the Court to take this opportunity and overturn *Roe*. And the Court recently declined to intervene in a case challenging a particularly cruel abortion ban in Texas, known as S.B. 8. This law bans abortion care after six weeks of pregnancy and entices private citizens to sue abortion providers and any individual who helps someone get the care they need by offering $10,000, minimum, should they win their case in court. As a result, *Roe* is effectively nullified in the second most populous state in the country. These harmful attacks on abortion rights are not limited to Texas. According to the Guttmacher Institute this year has already been the most devastating state legislative session with more abortion restrictions being enacted than in any prior year since *Roe*.[1] Already, lawmakers have pre-filed a S.B. 8 copycat in Florida and more states are expected to follow.

Today, in much of the country, abortion care is out of reach for too many members of our communities. Lack of insurance coverage for this essential care, a shortage of abortion providers, and hundreds of medically unjustified state restrictions have compounded the problem and made abortion nearly impossible to obtain. These obstacles fall most heavily on groups already experiencing significant barriers to essential health care due to discrimination, lack of insurance, and lack of financial resources.

As providers, we see firsthand the harm restrictions on abortion care cause our patients. Denial of abortion care can have serious long-lasting consequences on a person's health and well-being. For

[1] Guttmacher, *State Policy Trends at Midyear 2021*, https://www.guttmacher.org/article/2021/07/state-policy-trends-midyear-2021-already-worst-legislative-year-ever-us-abortion.

example, women who have been denied an abortion are more likely to experience high blood pressure and other serious medical conditions during the end of pregnancy, more likely to remain in relationships where interpersonal violence is present; and more likely to experience poverty.[2]

The American College of Obstetricians and Gynecologists (ACOG), along with other medical societies, identifies abortion as an essential health care service that requires timely access to care. ACOG also recommends the repeal of legislation that imposes barriers to access and interferes with the patient-provider relationship, including abortion bans, mandatory waiting periods, biased counseling, medically unnecessary ultrasounds, and unjustified facility and staffing requirements.[3] Twenty-four medical organizations including the American Medical Association, the American Association of Pediatrics, the American Academy of Family Physicians, and the America College of Nurse-Midwives recently joined ACOG in filing an amicus brief urging the Supreme Court to strike down Mississippi's ban on abortion after 15 weeks of pregnancy.[4]

Abortion is health care and it should not be singled out for exclusion or have additional administrative or financial burdens placed upon it. Abortion is extremely safe and arbitrary barriers on abortion care do not make it any safer. In 2018, the National Academies of Sciences, Engineering and Medicine (NASEM) published a comprehensive study affirming the safety record of abortion and pointed out that the biggest threat to patient safety is the litany of medically unnecessary regulations that raise costs and delay procedures, ultimately putting patients' health at risk.[5]

Restrictions on abortion care have far reaching consequences. Abortion restrictions both deepen existing inequities and threaten health outcomes for pregnant people and people giving birth. We know that while most people will have healthy pregnancies, some will experience illness or conditions where pregnancy can cause serious problems. When abortion is difficult or impossible to access, complicated health conditions can worsen and even result in death. In order to address our nation's ongoing maternal health crisis, a named priority for Members of this Committee, abortion care must be accessible. The communities that are facing the most barriers to accessing abortion care are the same communities that are unable to access high quality, community grounded, culturally responsive prenatal and maternity care.

The current situation in Texas is indefensible. Due to the inadequate health exception in S.B. 8, providers are put in an impossible position: risk a lawsuit, wait for a patient's health to worsen so they can provide abortion care, or ask their patient to travel out of state, hours away from home, to obtain needed care. This is not how medicine should be practiced. Not in Texas, not in the United States, not anywhere. In

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[2] The Harms of Denying a Woman a Wanted Abortion. Advancing New Standards in Reproductive Health. University of California at San Francisco, *available at* https://www.ansirh.org/sites/default/files/publications/files/the_harms_of_denying_a_woman_a_wanted_abortion_4-16-2020.pdf.

[3] American College of Obstetricians and Gynecologists Committee Opinion 815, "Increasing Access to Abortion." December 2020, *available at* https://www.acog.org/clinical/clinicalguidance/committeeopinion/articles/2020/12/increasing-access-to-abortion.

[4] Brief of American College of Obstetricians and Gynecologists et al as *amicus curiae* in *Dobbs v. Jackson Women's Health Services* (2021) available at https://www.acog.org/-/media/project/acog/acogorg/files/advocacy/amicus-briefs/2021/20210920-dobbs-v-jwho-amicus-brief.pdf?la=en&hash=717DFDD07A03B93A0449QE66835BB8C5.

[5] National Academies of Sciences, Engineering, and Medicine. The safety and quality of abortion care in the United States. Washington DC; National Academies Press; 2018, https://www.nap.edu/catalog/24950/thesafety-and-quality-of-abortion-care-in-the-united-states.

urgent, complex medical situations, providers must be able to take care of their patients – not worry about malicious, unconstitutional lawsuits.

It is undeniable that the United States has a two-tiered system for reproductive health care and it is only getting worse. Our nation is only beginning to emerge from an ongoing pandemic that has disproportionately harmed communities of color and we continue to reckon with systemic racial injustice at the hands of the State. Measures that restrict and criminalize abortion are just another form of the reproductive oppression that people of color have been subject to for centuries. It is critical we place this moment, laws like S.B. 8, and the imminent threat to reproductive health care within this larger context. As we work to address inequities and injustice at all levels, we must understand that for Black people, Indigenous people, communities of color, immigrants, young people, people with low incomes, and LGBTQ+ people, losing the fragile protections provided by *Roe v. Wade* would be devastating.

On September 24, 2021, the House of Representatives voted to pass the Women's Health Protect Act to help put an end to arbitrary and medically unnecessary barriers on abortion care. We urge Members of this Committee to support this bill and push for its passage, as well as others that would increase access to health care rather than limit it including the EACH Act, HEAL Act, the Pregnant Workers Fairness Act, and maternal health care provisions included in the Build Back Better package. Our patients and our communities cannot wait.

Members of the Senate Committee on the Judiciary,

My name is Kristan Hawkins, and I'm the President of Students for Life of America and Students for Life Action. On behalf of our nearly 1,300 active groups and of the more than 127,000 student activists we've trained across the nation, I would like to express our strong support for the Texas Heartbeat Law.

Let me be clear, when the Supreme Court denied relief from the Texas Heartbeat Law, there was no "shadow docket" or "midnight order." Abortion advocates are merely frustrated because that law prevents them from easily identifying someone to sue.

The decision of the Supreme Court was simply consistent with the Court's normal processes. The plaintiffs did not carry their burden successfully, so the law went into effect as scheduled. The Court cannot block a perceived "bad" law; their ruling can only inhibit enforcement. It was impossible for the Supreme Court to grant emergency relief that prevents potential harm because that relief would only apply to the named defendants, leaving nearly every other person in the state of Texas free to file a lawsuit against the plaintiffs.

Although the Supreme Court did not produce a decision based on the *merits* of the Heartbeat Law, I will. Out of the more than a dozen states that have passed a "heartbeat law," Texas is the only state where that law is now in effect. **Today, an estimated 4,350 innocent preborn lives have been saved from the violence of abortion because of this bold and innovative law.**

States like Texas are and should challenge *Roe* because it was a poorly decided and outdated ruling made obsolete by modern scientific and societal advances. *Roe* asserts that the right to "privacy" and "abortion" were inscribed in invisible ink, contorting the U.S. Constitution to fit their narrative rather than interpreting the law of the land as written. Even liberal legal minds acknowledge that the constitutional basis to justify *Roe* is questionable at best. **As a result, this tragic decision sentenced more than 62 million preborn babies to death.**

Although abortion advocates tout tremendous public support for *Roe v. Wade*, Americans tend to misunderstand the actual implications of the decision – abortion on-demand for any reason through all nine months of pregnancy. In reality, **only 13% of Americans support abortion in the third trimester**, according to a 2018 Gallup poll. Furthermore, half of the country believes abortion should be illegal once a preborn child's heart begins to beat.

Clearly, the majority of Americans actually support significant restrictions on abortion. The American government was designed to be by the people, for the people. Abortion policy belongs to the states, where Americans can participate in the democratic process as intended by the Founding Fathers.

Senators, the future is anti-abortion. Texas should serve as an example of the will of the American people. We desire to protect innocent preborn children from the violence of abortion. It's time that right was returned to us.

Thank you,

Kristan Hawkins

FREEDOM FROM RELIGION *foundation*

P.O. BOX 750 · MADISON, WI 53701 · (608) 256-8900 · WWW.FFRF.ORG

September 29, 2021

The Honorable Dick Durbin
Chair
Committee on the Judiciary
711 Hart Senate Office Building
Washington, DC 20510

The Honorable Chuck Grassley
Ranking Member
Committee on the Judiciary
135 Hart Senate Office Building
Washington, DC 20510

Re: Court reform is the only viable solution to rectify shadow docket abuse and secure reproductive liberty

Dear Chairman Durbin and Senator Grassley:

We are submitting this testimony on behalf of the Freedom From Religion Foundation (FFRF) and our 35,000 secular members, to emphasize the need for immediate court reform in order to address the problems discussed at today's hearing. FFRF is a national nonprofit organization with members in all 50 states, D.C., and Puerto Rico. FFRF's purposes are to protect the constitutional separation between state and church, and to educate the public about nontheism.

Thank you for holding today's hearing about Texas S.B. 8 and the Supreme Court's abuse of the shadow docket. Both of these are critical issues, but they are also both symptoms of a deeper sickness on this Supreme Court. While Congress should treat these symptoms, such treatments are temporary band-aids. Without a true cure, these symptoms will recur and others will manifest.

If Congress is serious about addressing these abuses, there is only one solution: it must expand and rebalance the federal judiciary. Anything else is a temporary fix at best. The deeper malady is a federal judiciary that has already been packed with ideologues who were handpicked by shadowy interest groups for their extremist and Christian nationalist credentials, including their commitment to overturning *Roe v. Wade*.

The symptoms

The U.S. Supreme Court allowed **S.B. 8** to go into effect in open defiance of precedent and without regard to the deliberate harm caused by banning nearly all abortion care in our second most populous state. We encourage Congress to take every action possible to end this immediate crisis, including passing the Women's Health Protection Act. But at the end of every road is a Supreme Court packed with justices chosen for their willingness to undermine and destroy reproductive rights. They will decide the validity not just of every state abortion ban,[1] but also any legislative fix this Congress adopts.

In addition to effectively overturning *Roe v. Wade* with one unsigned paragraph, the Supreme Court has disproportionately used the **shadow docket** to approve the execution of prisoners and to allow church litigants to defy life-saving executive branch measures to combat a global pandemic. Showing its favoritism for extreme "religious liberty," the court between August 2020 and July 2021 sided with ten out of ten churches or other religious entities challenging public health guidelines amid the coronavirus pandemic.[2]

The shadow docket began to look like collusion between Trump justices and the Trump administration. In four years, Trump's administration made 41 requests on the shadow docket and won 28. Only eight requests were filed in the 16 previous years spanning the two terms of both George W. Bush and Barack Obama, and they only won four. That's a massive jump in the win rate (50% to 68%) and in the rate at which these wins are handed down (0.5/year to 7/year, a 14-fold increase).[3]

The recent abuse of the shadow docket has shown that five justices, including all the Trump justices, have already decided these issues. That's why they were chosen. They're not even pretending to weigh legal arguments or consider precedent. When it comes to Texas S.B. 8, the Supreme Court clearly signaled it is ignoring precedent.

The right to abortion access and the ability of governors to protect the public from deadly pandemics will not be the last rights the court destroys without regard for precedent or real-world harm. These are just the beginning. After gutting *Roe v. Wade*, the court will likely turn its attention to fully eviscerating the right to privacy by going after contraceptive access.[4] It has the votes to overturn *Obergefell v. Hodges* and end marriage equality.[5]

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[1] Indeed, the court is set to roll back abortion rights further in, *Jackson Women's Health Org. v. Dobbs*, 945 F.3d 265 (5th Cir. 2019), *cert. granted, Dobbs v. Jackson Women's Health Org.*, 209 L.Ed.2d 748 (U.S. May 17, 2021) (No. 19-1392).

[2] Lawrence Hurley and Andrew Chung, *Analysis: U.S. Supreme Court's "shadow docket" favored religion and Trump*, Reuters (July 28, 2021), *available at* https://reut.rs/3tedfrY.

[3] Steve Vladeck, *The Supreme Court's "shadow docket" helped Trump 28 times. Biden is 0 for 1*, The Washington Post (August 26, 2021), *available at* https://wapo.st/3EWk2Ek; Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 Harv.L.Rev. 123 (2019); Hurley, Chung, Jonathan Allen, *The "shadow docket": How the U.S. Supreme Court quietly dispatches key rulings*, Reuters (March 23, 2021), *available at* https://reut.rs/3hevtxJ.

[4] *See* Andrew L. Seidel, *First Roe, then contraception: unless action is taken, Supreme Court is about to strike down fundamental rights of American women*, Religion Dispatches (May 20, 2021), *available at* https://bit.ly/3EVY9oM.

[5] *See* Andrew L. Seidel, *Could this Supreme Court undo marriage equality?*, Religion Dispatches (September 23, 2021), *available at* religiondispatches.org/could-this-supreme-court-undo-marriage-equality/.

The cure

Former President Trump's appointments now make up a third of the federal judiciary and a third of the U.S. Supreme Court. Court expansion is also the only way for Congress to correct the damage done to the U.S. Supreme Court after Senator Mitch McConnell stole two seats. He didn't orchestrate that theft because he wanted to install qualified, impartial judges who would administer the law evenhandedly—he wanted to install ideologues who would solidify conservative minority rule for a generation. The courts are already packed.

Even without the packed and unbalanced nature of those appointments, Court expansion of the lower federal judiciary is objectively long overdue, given that Congress hasn't expanded the courts of appeals since 1990, when 179 active judges served 250 million Americans. Today, with a population of 330 million Americans, there are still only 179 active judges serving on the appeals courts, and they are swamped.

The right-wing lurch of the Supreme Court must be corrected. Several strong bills have been introduced that would, together, expand the entire judiciary, including the Supreme Court, and would create ethical mandates for Supreme Court justices, which are currently sadly lacking. These include the Judiciary Act of 2021 (S. 1141), the District Courts Judgeships Act of 2021 (H.R. 4886), and the Anti-Corruption and Public Integrity Act (S. 3357).

Allowing a small group of hyperconservative extremists and theocrats to rewrite constitutional law jeopardizes the fundamental rights of every American. Court reform, expansion and rebalance is the way to restore public confidence in the judiciary, and to preserve myriad hard-fought human and civil rights.

Thank you for your important work on this issue. We strongly urge the members of the Senate Judiciary Committee to recognize the need for immediate court reform to address these crucial matters.

Very truly,

Annie Laurie Gaylor Dan Barker

Annie Laurie Gaylor & Dan Barker
Co-Presidents
ALG/DB:rdj/als

CATHERINE GLENN FOSTER, M.A., J.D.
President and CEO, Americans United for Life

Hearing of the Senate Judiciary Committee
"Texas's Unconstitutional Abortion Ban and the Role of the Shadow Docket"

September 29, 2021, 10:00 AM
Hart Senate Office Building, Room 216

Dear Chair Durbin, Ranking Member Grassley, and Members of the Committee:

I am privileged to submit written testimony to this Committee on Texas Health & Safety Code § 171.204 (SB 8, or the "Heartbeat Law") and the state of constitutional law as it relates to abortion. I serve as President & CEO of Americans United for Life (AUL), America's original and most active pro-life legal advocacy organization. Founded in 1971, two years before the Supreme Court's decision in *Roe v. Wade*, AUL has dedicated 50 years to advocating for comprehensive legal protections for human life from fertilization to natural death. AUL attorneys are highly regarded experts on the Constitution and legal issues touching on abortion and are often consulted on various bills, amendments, and ongoing litigation across the country.

I. SB 8 is unconstitutional–for now.

If the question before the Committee was simply "does SB 8 pass constitutional muster within the current *Roe/Casey* framework," then this would be a very short hearing. The answer to that question is obviously no. However, on December 1, 2021, the Supreme Court of the United States will hear oral arguments in *Dobbs v. Jackson Women's Health Org.*[1] and consider the question presented: Whether all pre-viability prohibitions on elective abortions are unconstitutional.

The Court can—and should—take the opportunity to recognize the unsettled nature of *Roe v. Wade*[2] and *Planned Parenthood of Southeastern Pennsylvania v. Casey*[3] and return lawmaking to legislators. Indeed, as Americans United for Life outlined in one of the two briefs we filed in *Dobbs:*

> The standard of review for abortion regulations has bounced around, case by case, from *Roe* to *June Medical*.[4] Aside from the constantly shifting standard of review, *Roe* is radically unsettled for additional reasons. It has not received the acquiescence of Justices or lower court judges. *Roe* was wrongly decided and poorly reasoned. Numerous

[1] No. 19-1392 (2021).
[2] 410 U.S. 113 (1973)
[3] 505 U.S. 833 (1992).
[4] 140 S. Ct. at 2182 (Kavanaugh, J., dissenting) ("Today, five Members of the Court reject the Whole Woman's Health cost-benefit standard."); *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2321 (2016) (Thomas, J., dissenting); *Casey*, 505 U.S. at 999 (Scalia, J., concurring in the judgment in part and dissenting in part) ("Has Roe succeeded in producing a settled body of law?"); *Akron*, 462 U.S. at 461 & n.8 (O'Connor, J., dissenting); *Carey v. Population Servs. Int'l.*, 431 U.S. 678, 704 (1977) (Powell, J., concurring in part and concurring in the judgment).

> adjudicative errors during the original deliberations—especially the absence of any evidentiary record—have contributed to making *Roe* unworkable. It has been the subject of persistent judicial and scholarly criticism. There is a constant search for a constitutional rationale for *Roe*, and the Court has yet to give a reasoned justification for the viability rule.[5] *Casey* is unsettled by its failure to ground the abortion right in the Constitution, by an ambiguous standard of review that is unworkable, by conflicting precedents that have "defied consistent application" by the lower courts, and by persistent judicial and scholarly criticism.[6] Politics aside, reconsidering *Roe* and *Casey* does not involve uprooting a stable, settled feature of the legal landscape. Because they are radically unsettled, *Roe* and *Casey* contradict the stare decisis values of consistency, dependability, and predictability and are entitled to minimal stare decisis respect.[7]

Furthermore, the viability rule was dictum in *Roe*, since neither Texas's nor Georgia's statutes was tied to viability.[8] "Neither Congress nor state legislatures are bound by language unnecessary for a decision, however strong,"[9] yet courts have held firm to a viability rule that does not allow the state to introduce evidence of a compelling interest that might outweigh the viability line.[10]

In the findings section of SB 8, Texas asserted its "compelling interests from the outset of a woman's pregnancy in protecting the health of the woman and the life of the unborn child."[11] Texas, like a dozen other states, passed a law prohibiting physicians from performing abortions after a fetal heartbeat is detected, around six weeks' gestation. In every one of those states, the law has been challenged and immediately enjoined. What made the Texas law different is the lack of government enforcement,[12] which is why it is the only Heartbeat Law currently in effect.

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[5] See Randy Beck, Gonzales, Casey and the Viability Rule, 103 Nw. U. L. Rev. 249 (2009).
[6] *Payne v. Tennessee*, 501 U.S. 808, 828–830 (1991).
[7] Brief of Americans United for Life as *Amicus Curiae* in Support of Petitioners at 2-3, *Dobbs v. Jackson Women's Health Organization*, No. 19-1392 (2021).
[8] Parts of an opinion are dicta if they are "not essential to [the court's] disposition of any of the issues contested." *Central Green Co. v. United States*, 531 U.S. 425, 431 (2001).
[9] Henry J. Friendly, Time and Tide in the Supreme Court, 2 Conn. L. Rev. 213, 216 (1968).
[10] Brief *Amici Curiae* of 228 Members of Congress in Support of Petitioners at 6-7, *Dobbs v. Jackson Women's Health Organization*, No. 19-1392 (2021).
[11] Tex. Health & Safety Code § 171.202(3).
[12] "(a) Notwithstanding Section 171.005 or any other law, the requirements of this subchapter shall be enforced exclusively through the private civil actions described in Section 171.208. No

At present, the government's ability to prohibit abortion before viability hinges on the litigiousness of those who oppose the law. No amount of scientific evidence or public outcry can move a judge who feels he is bound by the viability line of *Casey*. In practice, the viability rule functions more as a "standard, except when it isn't." One-third of the states have pain-capable laws (20 weeks' gestation) currently in effect because they have not been challenged.[13] Perhaps this is because opponents of these laws fear the Court may have revisited *Casey* sooner.

Lower courts are split on whether laws prohibiting discriminatory abortions on the basis of prenatal diagnosis of Down syndrome or other fetal anomalies run afoul of the viability line, meaning that about half of such laws are enjoined and half are in effect.[14] Again, the viability standard creates a messy, inequal outcome and hamstrings states from acting upon their well-established compelling interest in preventing discrimination.

Indeed, the United States House of Representatives voting on HR 3755, the "Women's Health Protection Act," suggests that Leadership recognizes the end of *Roe/Casey* is nigh and lawmaking will finally be returned to lawmakers.

II. The so-called Women's Health Protection Act, Congressional Democrats' response to Texas SB 8, would trample any pretense of federalism, effectively banning all state abortion regulations and forcing every state to have abortion on demand throughout pregnancy.

The Women's Health Protection Act does everything but protect women's health. It impedes the States' legitimate interest in protecting life, attempts to negate currently existing commonsense protections for women's health, and prohibits any such protections from being enacted in the future.

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enforcement of this subchapter, and no enforcement of Chapters 19 and 22, Penal Code, in response to violations of this subchapter, may be taken or threatened by this state, a political subdivision, a district or county attorney, or an executive or administrative officer or employee of this state or a political subdivision against any person, except as provided in Section 171.208, Tex. Health & Safety Code § 171.207."

[13] Brief *Amici Curiae* of 228 Members of Congress in Support of Petitioners at 6-7, *Dobbs v. Jackson Women's Health Organization*, No. 19-1392 (2021).

[14] Compare *Preterm-Cleveland*, 994 F.3d at 517–18 with *Little Rock Fam. Plan. Servs. v. Rutledge*, 984 F.3d 682, 690 (8th Cir. 2021).

The Act would significantly limit the States' ability to enact desperately needed public policy that furthers the Supreme Court-sanctioned goals of protecting the health and safety of women and girls and valuing human life. By banning virtually all state laws before viability, the Act would prevent basic regulation and oversight crucial to keeping women safe.

SB 8 would just be the beginning. Here are some of the thousands of health and safety laws that could be invalidated by WHPA:

- **Gestational age limits:** 43 states and counting[15] have laws that restrict elective abortions at or before "viability" based on women's health and the interests of the child.[16]
- **Fetal pain:** Currently 18 of those states limit abortion to 20 weeks' gestation based on scientific evidence that the baby can feel pain.[17]
- **Discrimination:** every state would be prohibited from preventing discriminatory abortions on the basis of race, sex, or genetic anomaly.
- **Informed consent:** Most states have enforceable informed consent and reflection period laws.
    - 28 states require written materials be either given or offered.[18]
    - 25 states require specific information be given on the abortion procedure.[19]
    - 31 states require the woman be informed of the probable gestational age of her fetus.[20]

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[15] New Hampshire Governor Sununu signed a 24 weeks' law this year which will take effect on Jan. 1, 2022.

[16] Michelle Ye Hee Lee, *Is the United States One of Seven Countries That "Allow Elective Abortions After 20 Weeks of Pregnancy?"*, THE WASHINGTON POST (Oct. 9, 2017) https://www.washingtonpost.com/news/fact-checker/wp/2017/10/09/is-the-united-states-one-of-seven-countries-that-allow-elective-abortions-after-20-weeks-of-pregnancy/.

[17] Brief *Amici Curiae* of 228 Members of Congress in Support of Petitioners at 6-7. *Dobbs v. Jackson Women's Health Organization*, No. 19-1392 (2021).

[18] These states are Alabama, Alaska, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Texas, Utah, West Virginia, and Wisconsin.

[19] These states are Alabama, Alaska, Arizona, Arkansas, Florida, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Utah, and Wisconsin.

[20] These states are Alabama, Alaska, Arizona, Arkansas, Connecticut, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, West Virginia, and Wisconsin.

- **Reflection periods:** 26 states have a reflection period[21] like Pennsylvania's 24-hour law upheld by the Supreme Court in *Casey*.[22]
- **Prohibiting telemedicine abortion:** 7 have already explicitly prohibited at-home abortions via telemedicine.[23] And around twenty states have laws requiring that abortion-inducing drugs be prescribed and supplied directly from the physician in a clinical setting.[24] Texas joined them when Governor Abbott signed SB 4 this summer.

According to Section 2(a)(9) of the WHPA, nearly 500 state laws to regulate abortion have been passed since 2011. This year, at least 21 states have enacted restrictions on abortion. WHPA seeks to invalidate most of them. The argument that abortion is a constitutionally protected right and therefore must be protected by the federal government means States would have virtually no say in enacting abortion laws. This bill pushes federal power over the power given to the States.

As if stripping many robust protections from existing state law is not enough, the WHPA also prohibits regulations of abortion providers that could be considered a restriction on an individual from having an abortion. The Act thereby engenders a regulatory regime that is akin to the one in Pennsylvania that allowed the infamous abortion provider Kermit Gosnell to operate his "House of Horrors" for many years. Gosnell, who was ultimately convicted of involuntary manslaughter, was able to provide unsafe, unsanitary, and deadly abortions for many years because, according to the Grand Jury report, the Pennsylvania Department of Health thought it could not inspect or regulate abortion clinics because that would interfere with access to abortion.[25] By lowering professional accountability, abortion providers will be free to operate without regulation and oversight, to the detriment of women and young girls.[26]

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[21] These states are Alabama, Arizona, Arkansas, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, West Virginia, and Wisconsin.

[22] *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 844 (1992).

[23] These are: Arizona, Idaho, Montana, Ohio, Oklahoma, West Virginia, and Wisconsin.

[24] Amanda Stirone, *State Regulation of Telemedicine Abortion and Court Challenges to Those Regulations*, 24 On Point (July 2018), https://s27589.pcdn.co/wp-content/uploads/2018/07/State-Regulation-of-Telemedicine-Abortion-and-Court-Challenges-to-Those-Regulations.pdf.

[25] *See, e.g.*, Conor Friedersdorf, Why Dr. Kermit Gosnell's Trial Should Be a Front-Page Story, ATLANTIC (Apr. 12, 2013), https://www.theatlantic.com/national/archive/2013/04/why-dr-kermit-gosnells-trial-should-be-a-front-pagestory/274944/ (discussing the case of Kermit Gosnell).

[26] *See, e.g.*, Ams. United for Life, UNSAFE (3d ed. 2021) (documenting unsafe practices of abortion providers and harm to women's health and safety).

III. Roe and its progeny never created an unfettered "right to abortion."

From its inception in *Roe v. Wade*, the abortion "right" has been explicitly qualified. While the Court established a constitutional "right" to abortion, it simultaneously expressed that "[t]he State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that [ensure] maximum safety for the patient."[27] Affirming what is considered the essential holding of *Roe*, the Supreme Court in *Planned Parenthood v. Casey* asserted that "it is a constitutional liberty of the woman to have some freedom to terminate her pregnancy. . . . The woman's liberty is not so unlimited, however, that from the outset [of pregnancy] the State cannot show its concern."[28]

Over the past five decades, the Supreme Court has, at various points, yielded back authority to the States, recognizing their many important interests in the area of abortion. As recently as 2020, the Supreme Court reverted to the more permissible *Casey* standard after several years of *Hellerstedt*. Indeed, the Justices exercised restraint in only addressing the standing issue as ripe and permitting SB 8 to take effect.

The American people, through their elected officials, recognize the need for basic oversight, for genuine informed consent, and for the interests of the child to factor in at some point in pregnancy, even if we disagree on when that is. It is certain Members of Congress who are out of step with the American people and the biological reality that a preborn child is a member of the human family, not the other way around.

The "right" to abortion in this country has never been unqualified or unregulated. Removing every medical component of the abortion procedure in the name of unfettered "access" isn't women's health—it's just abortion.

IV. Conclusion

The outcome of enacting this radical regime of abortion on demand across the country would be devastating. Communities would be unable to act if a Gosnell or Klopfer set up shop. States would be unable to protect women from bad doctors and

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[27] *Roe*, 410 U.S. at 150.
[28] *Casey*, 505 U.S. at 869.

unsanitary clinics. Emergency protections and basic informed consent would be stripped away. Women suffering complications would be abandoned, reliant only on emergency rooms with no continuity of care. And complications would increase as the procedure is de-medicalized by doctors who now say they don't even need to see a patient in person or independently verify pregnancy before prescribing chemical abortion pills.

Congress expresses policy preferences in the bills it considers and the hearings it schedules. This hearing says that browbeating duly elected Texas lawmakers is more important than funding the government. The WHPA says that speedy abortions are valued over women and girls' health and safety. That at no point in pregnancy do the child's interests come into play. That the States, who broadly enact and enforce local healthcare regulations, no longer have a say in this one area of medicine.

Congress—and the Supreme Court—should let Texans govern Texas.

Sincerely,

Catherine Glenn Foster
President and CEO
Americans United for Life

October 6, 2021

U.S. Senate Judiciary Committee
c/o Chair Dick Durbin
224 Dirksen Senate Office Building
Washington, DC 20510

Dear U.S. Senate Judiciary Members,

American democracy can no longer be taken for granted. Last month, Governor Greg Abbott signed Senate Bill 1 — Texas Republicans' sweeping voter suppression legislation — into law. We expect the GOP-led Texas Legislature to move discriminatory redistricting plans quickly during the legislative special session currently underway. That is why we are urging you to do everything possible to push for swift passage and enactment of the John Lewis Voting Rights Advancement Act.

As Democratic Members in the Texas House of Representatives, we have long been on the front lines of this struggle. Ten years ago, redistricting maps for Congress and the two houses of the Texas Legislature were ultimately revised by the Courts, having been found to intentionally discriminate against racial minorities. That same session, the Legislature passed SB 14, then the most restrictive photo voter identification law in the country. The law permitted the use of a concealed handgun license ID but prohibited the use of state employee IDs, even though both were issued by the same agency with the same rules. SB 14 was struck down by federal courts and revised to allow a reasonable impediment declaration. With this ruling, approximately 800,000 registered Texas voters – disproportionally racial minorities – regained the right to vote. But, that same session, the Legislature passed revisions to the state's voter registration procedures, effectively banning voter registration drives. This law too was struck down by a federal district court, only to be revived by the Fifth Circuit Court of Appeals.

Many of the 2011 state laws were successfully challenged under Section 5 of the 1965 Voting Rights Act. Unfortunately for our constituents, the Supreme Court struck down this provision of the Act in *Shelby County v. Holder*, a case supported and celebrated by our then-Attorney General and current Governor, Greg Abbott. Immediately thereafter, local counties and school districts eliminated minority officeholders and enacted voting procedures designed to harm racial minorities.

As we begin another redistricting cycle, Texas is now free to enact any racially discriminatory election practice it desires, stymied only by the remote chance that the Fifth Circuit or the United States Supreme Court will stop them. Article I, Section 4, Clause 1 of the U.S. Constitution provides: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." Congress must exercise this authority immediately by passing a new voting rights act that includes preclearance, as well as other important safeguards binding courts to protect the right to vote.

In the last ten years, additional criminalization of the voting process in Texas has continued. The state Attorney General has proceeded with public fanfare and haste to prosecute racial minorities for voting related "crimes." When the pandemic hit, the state schemed the electoral rules to benefit white voters over all others. In-person voting was made mandatory for nearly all citizens under age 65 except those with disabilities. Voters over the age of 65 in Texas are disproportionately white. The Texas Supreme Court then ruled that a disability under the statute did not include lack of immunity to COVID-19.

Meanwhile, the Fifth Circuit ruled in a case challenging the restriction of vote by mail to persons over age 65 as a violation of the 26th Amendment's ban on age discrimination in voting that the Constitution does not prohibit state laws that preference some voters over others (*See TDP v. Abbott,* 978 F.3d 168, 191 (5th Cir. 2020), "a law that makes it easier for others to vote does not abridge any person's right to vote... [under the Constitution]"). Therefore, in the 2020 election, voters over age 65, disproportionally white, could vote safely by mail while the more diverse younger voters were required to do so in person. Texas was one of only four states to make this racially discriminatory choice.

In this last election, local election officials, operating within state law, took various steps to facilitate voting, including offering drive-through voting centers and community drop boxes for mail ballots. In each case, the state executive and judicial branches overrode them. Governor Abbott, after voting was already underway, ordered large counties, such as Harris and Dallas, to have the same number of mail ballot drop locations as the most sparsely populated counties in our state: one.

The state's recent efforts to preference voting for the white electorate did not stop in November. Texas Attorney General Ken Paxton filed the ill-fated lawsuit in the U.S. Supreme Court seeking to overturn the elections of other states because the other states had not limited voting as Texas had done. The Attorney General then spoke at the rally that preceded the January 6 insurrection at the United States Capitol. One of Texas's U.S. Senators led the fight on the Senate floor to overturn the election results.

Having failed to void the will of voters, the state leadership has now opened a slew of criminal investigations related to voting and the Attorney General is seeking statewide prosecutorial authority. Over the past year, there have been scores of proposals to limit voting by racial minorities filed in the Legislature. The Governor has made passing these restrictions a top priority – even giving it an official "emergency" designation, a rare maneuver designed to fast-track legislation. Now signed into law, Senate Bill 1 is calculated to benefit Republican-leaning white voters over Asian-Americans, African Americans and Latinos.

Our state has struggled to live up to its democratic promise from the very start. But Texas has also been a leader at times. President Lyndon Johnson pushed for and secured the passage of the 1965 Voting Rights Act and Barbara Jordan led the effort a few years later to see Texas fully covered under the Act and to recognize the importance of protecting Latino voting rights. A Republican president from Texas, George W. Bush, signed the reauthorization of the Voting Rights Act in 2006. In the 1970s and the early 1980s, Texas led with some progressive reforms, including being one of the first states to adopt an early voting period.

Nevertheless, at this moment, Texas is diversifying and those who are in power remain steadfast in their conviction to manipulate the voting rules to ensure they remain in power by limiting access to the ballot by minority Texans.

As legislative leaders, we have fought, and continue to fight, against these onerous policies in every way we can. Many Texas House Democrats spent several weeks this past summer in Washington, D.C. pushing for the immediate passage of federal voter protection legislation. It is absolutely necessary that, as our representatives in Congress, you do what it takes to pass the John Lewis Voting Rights Advancement Act.

We stand ready to work shoulder to shoulder with you to ensure that voting rights are protected. Our Democracy depends on it.

Sincerely,

Rep. Chris Turner
Chair, Texas House Democratic Caucus

Rep. Alma Allen

Rep. Rafael Anchia

Rep. Michelle Beckley

Rep. Diego Bernal

Rep. Rhetta Andrews Bowers

Rep. John Bucy, III

Rep. Liz Campos

Rep. Terry Canales

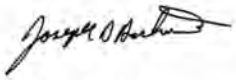
Rep. Sheryl Cole

Rep. Garnet Coleman

Rep. Nicole Collier

Rep. Philip Cortez

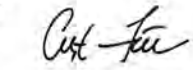
Rep. Jasmine Crockett



Rep. Joe Deshotel

Rep. Alex Dominguez

Rep. Harold Dutton



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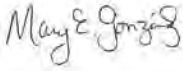
Rep. Jessica González



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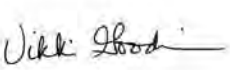

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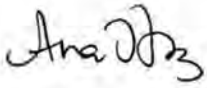

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Rep. Celia Israel

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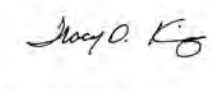
Rep. Jarvis Johnson

Rep. Julie Johnson



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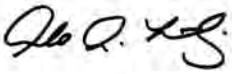
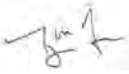
Rep. Eddie Lucio, III



Rep. Armando Martinez



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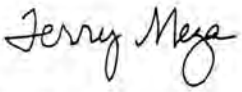

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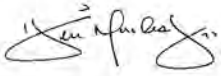
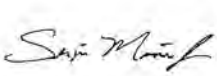
Rep. Christina Morales



Rep. Eddie Morales

Rep. Penny Morales Shaw



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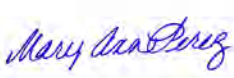
Rep. Victoria Neave

Rep. Claudia Ordaz Perez

Rep. Evelina "Lina" Ortega



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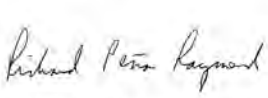

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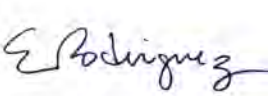

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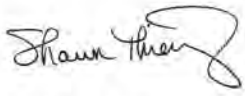

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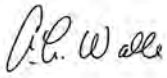

Rep. Armando Walle

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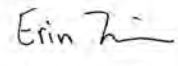

Rep. Erin Zwiener

UNRIG THE COURTS

September 28, 2021

The Honorable Dick Durbin
Chair
Senate Committee on the Judiciary
United States Senate
Washington, DC 20515

The Honorable Sheldon Whitehouse
Chair
Subcommittee on Federal Courts, Oversight, Agency Action & Federal Rights
United States Senate
Washington, DC 20515

Dear Chairs Durbin and Whitehouse:

On behalf of the Unrig the Courts coalition, thank you for your commitment to holding a hearing on the Supreme Court's so-called "shadow docket," which has been used with alarming frequency in recent years to undermine long-held civil and constitutional rights. Just in the last few months, the shadow docket has been used to effectively overturn *Roe v. Wade* in Texas, allow landlords to throw renters out of their homes in the middle of a surging pandemic, and force immigrants seeking asylum in our country to "remain in Mexico," putting them at grievous risk while they wait for relief.

As you know, shadow docket decisions are not fully briefed or argued in front of the Supreme Court, and the justices who issue these decisions are not required to sign their names to these orders. At the very least, the American public deserves to know where the justices stand on critical issues of law and the constitution -- anonymity should not be granted to justices who seek to put us all in harm's way.

Our coalition agrees that reforms to the shadow docket would be welcome, and increased transparency requirements both for the Supreme Court as an institution and for the justices themselves are necessary. **But this hearing is not enough.**

The central problem with the Supreme Court is that it has been taken over by conservative extremists who are more loyal to far-right political outcomes than they are to the law. Heightened transparency requirements might show just how partisan the Court has become, but it will do nothing to address the conservative capture of the bench. The only solution to that problem is to increase the number of justices by at least four, from 9 to 13.

That is why we write to ask you to schedule an additional hearing as soon as possible about the pressing need for Supreme Court expansion.

This is no passing ideological disagreement on our part with the conservative wing of the Supreme Court. The conservative justices do not behave like umpires calling balls and strikes. Instead, they now routinely throw out decades of precedent on the flimsiest justifications imaginable, all to protect the interests of their preferred political party. From granting corporations personhood rights in *Citizens United*; to trashing 40-years of labor law precedent to undercut worker power in *Janus*; to gutting the Voting Rights Act -- twice -- because "things have changed dramatically" in the South; to allowing the state of Texas to effectively ban abortion without even holding so much as an oral argument, it is beyond clear that this Court is dangerous and is not bound by its own precedents when it comes to waging a culture war with the American public.

The Supreme Court wasn't rigged overnight and it won't be unrigged overnight, either. But Supreme Court expansion is an immediate step we can take to address our broken court system and preserve any future progressive legislation or administrative decisions -- and there is a bill pending this Congress, the Judiciary Act of 2021, which would do just that.

We look forward to working with you and the committee on this critical legislation.

Respectfully,

Demos Action
Indivisible
Just Democracy
People's Parity Project
Stand Up America
Take Back the Court

Deeds
Not Words

Attn: The Honorable Sen Durbin, Chair
224 Dirksen Senate Office Building
Washington, DC 20510

Re: Written testimony; A State of Crisis: Examining the Urgent Need to Protect and Expand Abortion Rights and Access/ SB8

Dear Sen. Durbin and Members of the US Senate Judiciary Committee,

My name is Braelynn Barborka and I am a student at University of Texas at Austin. I am a Campus Organizer with Deeds Not Words, a gender equity organization that galvanizes the power of young people through policy making ,art, organizing, and voting. I have lived in Texas my whole life. My whole life my right to making decisions about my body has been discussed. The fact that I have had to fight for my right to make a decision about my own body my entire life is frustrating.

S.B. 8 is taking away my choices. I won't be able to decide what is best for me. Enforcing this law will cause many individuals who are forced to give birth to survive a system that could care less about a baby after it leaves the womb. Individuals who take care of children are left with surviving on their own even when they are not ready. We know that banning abortions does not stop abortion, it stops safe abortions. Don't make people have to get illegal and unsafe abortions when they know they are not prepared to give a good life to themselves and a child. A country that prides itself on freedom has proved time and time again that only white men are allowed that privilege.

Now, when I am thinking of my future plans and what things I can do I have to always have a backup plan. I now always have to think about what I will do if I get preganant and I am unable to get an abortion. I have to consider what could happen to me if I were to be raped, and how I would have to bear the consequences, while

my rapist has none. I have to think about how to handle the effect of something when I am limited to only one choice. I am asking you to see the horrific future that can be created if S.B. 8 continues to exist. It will leave many people having to choose between their safety or a life where they could potentially be struggling to survive and keep their babies alive. Please don't allow this law to take away my right to make a decision that will only impact myself and no one else.

I would like to conclude by thanking you for your time and giving me the opportunity to write to you today to share why S.B. 8 will negatively impact my life as well as anyone else who will have choices taken from them.

Andrea Reyes, Political Director at Deeds Not Words
andrea@deedsnotwords.com
Deeds Not Words a 501(c)(3) is a non-profit organization dedicated to standing for gender equity in Texas.

Statement of NARAL Pro-Choice America
U.S. Senate Committee on the Judiciary
Texas's Unconstitutional Abortion Ban and the Role of the Shadow Docket
September 29, 2021

Thank you for the opportunity to submit a statement to the U.S. Senate Committee on the Judiciary on the vital topic of Texas's unconstitutional abortion ban, Senate Bill 8 (SB 8), and the role of the shadow docket. NARAL Pro-Choice America (NARAL) is a national advocacy organization, dedicated to protecting and advancing reproductive freedom, including access to abortion, contraception, paid leave, and protection from pregnancy discrimination, as a fundamental right and value. Through education, organizing, and influencing public policy, NARAL and our 2.5 million members from every state and congressional district in the country work to guarantee every individual the freedom to make personal decisions about their lives, bodies, and futures, free from political interference. For this reason, we are submitting this statement to reiterate the harm state-level attacks on abortion have on reproductive freedom and the compounding harm the Supreme Court's willingness to undermine constitutionally protected rights in the dark of night, including via the so-called "shadow docket."

The legal right to abortion faces its greatest threat in decades. Despite overwhelming public support (8 in 10 Americans) for the legal right to abortion, we're in the midst of an all-out assault on reproductive freedom with *Roe v. Wade* hanging in the balance. Anti-choice lawmakers are emboldened in their attack on reproductive freedom by a decades-long strategy to capture the courts, resulting in an anti-choice supermajority on the Supreme Court. This year alone, state legislatures have introduced, advanced, or passed over 330 abortion restrictions, systematically chipping away at the right to abortion across the country and pushing access to abortion care out of reach for millions of people. We are now witnessing how the anti-choice supermajority on the Court is utilizing mechanisms like the shadow docket to allow these anti-choice and unconstitutional laws to stand.

Earlier this month, the most restrictive and draconian abortion ban, Texas SB 8, went into effect in Texas, bannning abortion before most people know they are pregnant and creating a bounty hunter system for private citizens to enforce the law with an incentive of a $10,000 reward. The Supreme Court, using the shadow docket, failed to intervene and subsequently rejected an emergency request to block SB 8, a blatantly unconstitutional ban on abortion. This law bans abortion at approximately six weeks before many people even know they are pregnant. It also grants private citizens the power to sue abortion providers and anyone else who helps someone access abortion care; this includes clergy members or counselors, abortion funds that assist someone in paying for abortion care, and even someone who drives

a patient to their appointment, like family members, friends, and rideshare drivers. An individual who successfully sues someone for "aiding and abetting" a pregnant person seeking abortion care, would receive a financial reward of $10,000. The Supreme Court's decision to allow SB 8 to go into effect essentially gave Texas the green light to render *Roe v. Wade* meaningless in the state and empowered anti-choice lawmakers to use this law as a blueprint to roll back reproductive freedom in their own states. Politicians in at least 11 states have already expressed intent to introduce similar versions of Texas's abortion ban. In fact, just weeks after Texas's SB8 went into effect, anti-choice lawmakers in Florida introduced their own version of the law, HB 167.

The looming threat to the future of legal abortion across the country is the result of a decades-long far-right strategy to advance a radical and out-of-touch ideological agenda. In the late 1970s, radical conservatives weaponized the formerly non-political, back-burner issue of abortion rights as political cover for their efforts to maintain white patriarchal control amidst diminishing support for racist policies like school segregation, which had previously been the backbone of their movement. In the years immediately preceding and following *Roe v. Wade*, Evangelical Christians, who now form the backbone of the GOP, were overwhelmingly indifferent on the issue of abortion. But through the carefully crafted messages of Paul Weyrich, Jerry Falwell, and other architects of the Radical Right, abortion became the political tool of choice for a movement determined to maintain control in a changing world, and the trojan horse for a far-reaching array of ideologies meant to thwart social progress.[i]

In the intervening years, opposition to abortion has become a litmus test in far-right circles for a host of political and judicial positions. In order to advance their agenda—one that stands in direct opposition to the values of the majority of Americans—they developed and implemented a strategy for capturing and maintaining minority rule. This strategy included pushing regressive boilerplate legislation chipping away at access to abortion through state legislatures and Congress, as well as stacking the federal judiciary with anti-choice ideologues.

Anti-choice activists have spent decades building their influence over the federal judiciary through well-funded, secretive networks like the Federalist Society. Conservative activists have never been shy about the fact that their takeover of the federal judiciary is part of a broad strategy to quell the majority and cement minority rule, but the election of Donald Trump took this tactic to new heights. In May 2016, Trump pledged to only nominate anti-choice judges, a promise he doubled down on in 2020.[ii,iii] And with the help of Mitch McConnell, Trump installed anti-choice federal judges with lifetime appointments at a breakneck pace. More than a quarter of currently active federal judges are now Trump appointees, including Supreme Court justices Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett—tipping the balance of the Court to a supermajority unmistakably hostile to reproductive freedom.[iv] As Barrett's nomination and confirmation were rushed through in the midst of an ongoing election, many advocates cautioned that this was yet another part of the anti-choice strategy to ultimately overturn *Roe*. Now we have already seen this supermajority on the Court use the so-called

"shadow docket" to undermine the right to abortion and abortion access.[v] With the Court poised to hear *Dobbs v. Jackson Women's Health Organization*, a case involving a Mississippi 15-week abortion ban that is a direct challenge to *Roe v. Wade*, there is no denying that the threat to the constitutional right to abortion is real.

Thanks to the use of the shadow docket, anti-choice extremists did not have to wait for the upcoming *Dobbs* case to render abortion inaccessible and *Roe* meaningless for one in ten women of reproductive age.[vi] The shadow docket is a mechanism whereby the justices may act in an accelerated manner, at the cost of a transparent judicial proceeding and legal decision. In recent years the Court has utilized the shadow docket at a higher level than before, issuing decisions with significant impact that allow controversial policies to go into effect, often unsigned and offering no reasoning.[vii] As a result, as is the case in Texas, Americans are robbed of their constitutional rights as these laws go into effect while the constitutionality is litigated in the lower courts. When recently interviewed about the shadow docket mechanism, Justice Breyer (who dissented in the Texas law shadow docket decision) noted, "It's a huge mistake to decide major things without the normal full argument."[viii]

Anti-choice lawmakers, emboldened by the anti-choice supermajority on the Court, have accelerated their push to pass blatantly unconstitutional bans and restrictions on abortion. The Supreme Court's use of the shadow docket has further enabled this quest by allowing these laws to take effect prior to full judicial review and, as a consequence, in the interim millions of people suffer the loss of their constitutional right to abortion. NARAL strongly urges the Committee to consider the harm these state-level attacks and the shadow docket have on millions of Americans as we work toward a world where *every* body is free to make the best decisions for themselves, their families, and their lives.

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[i] Randall Balmer, *The Real Origins of the Religious Right*, POLITICO MAGAZINE (May 27, 2014), https://www.politico.com/magazine/story/2014/05/religious-right-real-origins-107133.

[ii] *Trump Letter on Pro-Life Coalition*, Sept. 2016, https://www.sba-list.org/wp-content/uploads/2016/09/Trump-Letter-on-ProLife-Coalition.pdf.

[iii] *Pro-Life Voices for Trump 2020*, Sept. 3, 2020, https://cdn.donaldjtrump.com/public-files/press_assets/pro-life-letter-potus.pdf.

[iv] John Gramlich, *How Trump compares with other recent presidents in appointing federal judges*, PEW RESEARCH CENTER (Jan. 13, 2021), https://www.pewresearch.org/fact-tank/2021/01/13/how-trump-compares-with-other-recent-presidents-in-appointing-federal-judges/.

[v] *Whole Woman's Health v. Jackson*, No. 21A24, 2021 WL 3910722 (U.S. Sept. 1, 2021); *Food & Drug Admin. v. American College of Obstetricians & Gynecologists*, 141 S.Ct. 578 (2021).

[vi] Elizabeth Nash, *Impact of Texas' Abortion Ban: A 14-Fold Increase in Driving Distance to Get an Abortion*, Guttmacher (Sep. 15, 2021), https://www.guttmacher.org/article/2021/08/impact-texas-abortion-ban-14-fold-increase-driving-distance-get-abortion. (stating that Texas has almost seven million women aged 15–49, out of a total of 75 million in the entire country).

[vii] Mike Fox, *Supreme Court Shadow Docket Leaves Reasoning in the Dark, Professors Say*, University of Virginia School of Law (Sep. 22, 2021) https://www.law.virginia.edu/news/202109/supreme-court-shadow-docket-leaves-reasoning-dark-professors-say.

[viii] Nina Totenberg, *Justice Breyer Says Supreme Court Upholding Texas Abortion Ban Was 'Very, Very, Wrong,'* NPR (Sep. 9, 2021) https://www.npr.org/2021/09/09/1035181247/justice-breyer-says-supreme-court-upholding-texas-abortion-ban-was-very-very-wro.

No. 19-1392

IN THE

Supreme Court of the United States

THOMAS E. DOBBS, M.D., M.P.H., STATE HEALTH OFFICER, MISSISSIPPI DEPARTMENT OF HEALTH, *et al.*,
Petitioners,

v.

JACKSON WOMEN'S HEALTH ORGANIZATION, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF AMICI CURIAE AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, AMERICAN MEDICAL ASSOCIATION, AMERICAN ACADEMY OF FAMILY PHYSICIANS, AMERICAN ACADEMY OF NURSING, AMERICAN ACADEMY OF PEDIATRICS, AMERICAN ASSOCIATION OF PUBLIC HEALTH PHYSICIANS, ET AL. IN SUPPORT OF RESPONDENTS

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ADDITIONAL AMICI LISTED ON INSIDE COVER

AMERICAN COLLEGE OF MEDICAL GENETICS AND GENOMICS, AMERICAN COLLEGE OF NURSE-MIDWIVES, AMERICAN COLLEGE OF OSTEOPATHIC OBSTETRICIANS AND GYNECOLOGISTS, AMERICAN COLLEGE OF PHYSICIANS, AMERICAN GYNECOLOGICAL AND OBSTETRICAL SOCIETY, AMERICAN MEDICAL WOMEN'S ASSOCIATION, AMERICAN PSYCHIATRIC ASSOCIATION, AMERICAN SOCIETY FOR REPRODUCTIVE MEDICINE, ASSOCIATION OF WOMEN'S HEALTH, OBSTETRIC AND NEONATAL NURSES, COUNCIL OF UNIVERSITY CHAIRS OF OBSTETRICS AND GYNECOLOGY, GLMA: HEALTH PROFESSIONALS ADVANCING LGBTQ EQUALITY, NORTH AMERICAN SOCIETY FOR PEDIATRIC AND ADOLESCENT GYNECOLOGY, NATIONAL MEDICAL ASSOCIATION, NATIONAL ASSOCIATION OF NURSE PRACTITIONERS IN WOMEN'S HEALTH, SOCIETY FOR ACADEMIC SPECIALISTS IN GENERAL OBSTETRICS AND GYNECOLOGY, SOCIETY OF FAMILY PLANNING, SOCIETY OF GENERAL INTERNAL MEDICINE, SOCIETY OF GYNECOLOGIC ONCOLOGY, AND SOCIETY OF OB/GYN HOSPITALISTS

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INTEREST OF AMICI CURIAE[1]

The American College of Obstetricians and Gynecologists ("ACOG"), American Medical Association ("AMA"), American Academy of Family Physicians ("AAFP"), American Academy of Nursing ("AAN"), American Academy of Pediatrics ("AAP"), American Association of Public Health Physicians ("AAPHP"), American College of Medical Genetics and Genomics ("ACMG"), American College of Nurse-Midwives ("ACNM"), American College of Osteopathic Obstetricians and Gynecologists ("ACOOG"), American College of Physicians ("ACP"), American Gynecological and Obstetrical Society ("AGOS"), American Medical Women's Association ("AMWA"), American Psychiatric Association ("APA"), American Society for Reproductive Medicine ("ASRM"), Association of Women's Health, Obstetric and Neonatal Nurses ("AWHONN"), Council of University Chairs of Obstetrics and Gynecology ("CUCOG"), GLMA: Health Professionals Advancing LGBTQ Equality ("GLMA"), North American Society for Pediatric and Adolescent Gynecology ("NASPAG"), National Medical Association ("NMA"), National Association of Nurse Practitioners in Women's Health ("NPWH"), Society for Academic Specialists in General Obstetrics and Gynecology ("SASGOG"), Society of Family Planning ("SFP"), Society of General Internal Medicine ("SGIM"), Society of Gynecologic Oncology ("SGO"), and Society of OB/GYN Hospitalists ("SOGH") submit this amici curiae brief in support of Respondents.

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[1] No counsel for a party authored this brief in whole or in part, and no entity or person, other than amici curiae, their members, and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief are on file with the Clerk.

ACOG is the nation's leading group of physicians providing health care for women. With more than 62,000 members, ACOG advocates for quality health care for women, maintains the highest standards of clinical practice and continuing education of its members, promotes patient education, and increases awareness among its members and the public of the changing issues facing women's health care. ACOG is committed to ensuring access to the full spectrum of evidence-based quality reproductive health care, including abortion care. ACOG has appeared as amicus curiae in courts throughout the country. ACOG's briefs and medical practice guidelines have been cited by numerous authorities, including this Court, as a leading provider of authoritative scientific data regarding childbirth and abortion.[2]

AMA is the largest professional association of physicians, residents, and medical students in the United States. Additionally, through state and specialty medical societies and other physician groups seated in the AMA's House of Delegates, substantially all U.S. physicians, residents, and medical students are represent-

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[2] *See, e.g., June Medical Servs. LLC* v. *Russo*, 140 S. Ct. 2103 (2020); *Whole Woman's Health* v. *Hellerstedt*, 136 S. Ct. 2292 (2016); *Stenberg* v. *Carhart*, 530 U.S. 914, 932-936 (2000) (quoting ACOG brief extensively and referring to ACOG as among the "significant medical authority" supporting the comparative safety of the abortion procedure at issue); *Hodgson* v. *Minnesota*, 497 U.S. 417, 454 n.38 (1990) (citing ACOG in assessing disputed parental notification requirement); *Simopoulos* v. *Virginia*, 462 U.S. 506, 517 (1983) (citing ACOG in discussing "accepted medical standards" for the provision of obstetric-gynecologic services, including abortions); *see also Gonzales* v. *Carhart*, 550 U.S. 124, 170-171, 175-178, 180 (2007) (Ginsburg, J., dissenting) (referring to ACOG as "experts" and repeatedly citing ACOG's brief and congressional submissions regarding abortion procedure).

ed in the AMA's policymaking process. The objectives of the AMA are to promote the science and art of medicine and the betterment of public health. AMA members practice in all fields of medical specialization and in every State. This Court and the federal courts of appeals have cited the AMA's publications and amicus curiae briefs in cases implicating a variety of medical questions.[3]

AAFP, founded in 1947, is one of the largest national medical organizations, representing 133,500 members nationwide who provide continuous comprehensive health care to the public.

AAN represents more than 2,800 of nursing's most accomplished leaders and serves the public by advancing health policy through the generation, synthesis, and dissemination of nursing knowledge.

AAP is a professional medical organization dedicated to the health, safety, and well-being of infants, children, adolescents, and young adults. Founded in 1930, its membership is comprised of 67,000 primary care pediatricians, pediatric medical subspecialists, and pediatric surgical specialists.

AAPHP represents public health physicians in promoting public health and preventive services.

ACMG is the only nationally recognized medical professional organization solely dedicated to improving

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[3] *See, e.g., Birchfield* v. *North Dakota*, 136 S. Ct. 2160 (2016) (citing AMA research on blood-alcohol levels that constitute drunk driving); *Graham* v. *Florida*, 560 U.S. 48 (2010) (citing AMA brief as medical authority on juvenile development); *Ferguson* v. *City of Charleston*, 532 U.S. 67 (2001) (citing AMA brief in assessing patient privacy).

health through the practice of medical genetics and genomics.

ACNM works to advance the practice of midwifery to achieve optimal health for women. Its members include approximately 7,000 certified nurse midwives and certified midwives who provide primary and maternity care services to help women and their newborns.

ACOOG is a nonprofit organization committed to excellence in women's health representing over 2,500 osteopathic providers.

ACP is the largest medical specialty organization in the U.S. Its membership includes 161,000 internal medicine physicians, related subspecialists, and medical students.

AGOS is an organization composed of individuals attaining national prominence in scholarship in the discipline of Obstetrics, Gynecology, and Women's Health. For over a century it has championed the highest quality of care for women and the science needed to improve women's health.

AMWA is the oldest multispecialty organization dedicated to advancing women in medicine and improving women's health.

APA is a nonprofit organization representing over 37,400 physicians who specialize in the practice of psychiatry.

ASRM is dedicated to the advancement of the science and practice of reproductive medicine. Its members include approximately 8,000 professionals.

AWHONN is a nonprofit organization representing the interests of 350,000 specialty nurses. Its mission is

to empower and support nurses caring for women, newborns, and their families.

CUCOG is an association promoting excellence in medical education in the fields of obstetrics and gynecology. Its members represent the departments of obstetrics and gynecology of schools of medicine across the country.

GLMA is the largest and oldest association of lesbian, gay, bisexual, transgender and queer (LGBTQ) health professionals and their allies whose mission is to ensure health equity for LGBTQ and all sexual and gender minority (SGM) individuals, and equality for LGBTQ/SGM health professionals.

NASPAG is composed of gynecologists, adolescent medicine specialists, pediatric endocrinologists, and other medical specialists dedicated to providing multidisciplinary leadership in education, research, and gynecologic care to improve the reproductive health of youth.

NMA, established in 1895, is the nation's oldest and largest professional and scientific organization representing more than 50,000 African American physicians and their patients, and advocating for parity and justice in medicine, the elimination of disparities in health and promotion of health equity.

NPWH is the nonprofit organization that represents Women's Health Nurse Practitioners and other advanced practice registered nurses who provide women's and gender-related healthcare.

SASGOG seeks to enhance women's health by supporting academic generalist physicians in all phases of their careers.

SFP represents approximately 800 scholars and academic clinicians united by a shared interest in advancing the science and clinical care of family planning.

SGIM is a member-based internal medical association of over 3,300 of the world's leading academic general internists, who are dedicated to improving the access to care for all populations, eliminating health care disparities and enhancing medical education.

SGO is the premier medical specialty society for health care professionals trained in the comprehensive management of gynecologic cancers.

SOGH is a group of physicians, midwives, nurses and others who support the OB/GYN Hospitalist model and improving outcomes for hospitalized women.

INTRODUCTION AND SUMMARY OF ARGUMENT

Reproductive health care is essential to women's overall health. Access to abortion is an important component of reproductive health care. Amici curiae are leading medical societies representing physicians, nurses, and other clinicians who serve patients in Mississippi and nationwide, and whose policies represent the education, training, and experience of clinicians in this country. Amici's position is that laws regulating abortion should be evidence-based, supported by a valid medical or scientific justification, and designed to improve—not harm—women's health.

Mississippi's attempt to ban nearly all abortions after fifteen weeks of pregnancy[4] is fundamentally at odds with the provision of safe and essential health care, scientific evidence, and medical ethics. Contrary to the assertions made by the Mississippi legislature and the State below, there is no medical or scientific justification for House Bill 1510 (the "fifteen-week ban" or "Ban"). Instead, the Ban threatens the health of pregnant patients by arbitrarily barring their access to a safe and essential component of health care. In particular, patients of color, those with limited socioeconomic means, and those in rural communities would be most severely harmed should the Ban be allowed to go into effect.

The Ban threatens to impose these harms in a plainly unconstitutional manner—by banning abortion months before viability, the line this Court has drawn and long honored due to its significance as the first

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[4] Under Mississippi House Bill 1510 (2018), "gestational age" is measured from the first day of a patient's last menstrual period ("LMP"). *See* Pet. App. 69a.

point in pregnancy at which fetal life can be medically sustained outside the pregnant person's body. Indeed, the Ban reflects a fundamental misunderstanding and misrepresentation of the science of fetal development. The science conclusively establishes that a fetus at fifteen weeks gestational age is incapable of experiencing pain. The science also makes clear that, at fifteen weeks, a fetus is nowhere near viability because it is months away from when it could survive delivery, even with the latest advances in technology and medical care.

The Ban also impermissibly intrudes into the patient-physician relationship by limiting a physician's ability to provide the health care that the patient, in consultation with her physician, decides is best for her health. Moreover, the Ban undermines longstanding principles of medical ethics and places clinicians in the untenable position of choosing between providing care consistent with their best medical judgment, scientific evidence, and the clinicians' ethical obligations *or* risk losing their medical licenses. The provision of safe abortion services after careful consultation with a patient does not demean the practice of medicine. But infringement on a clinician's ability to honor patient autonomy, by allowing patients to make their own health care decisions, certainly does.

ARGUMENT

I. ABORTION IS A SAFE, COMMON, AND ESSENTIAL COMPONENT OF HEALTH CARE

Abortion is a common medical procedure. In 2017, over 860,000 abortions were performed nationwide,[5] including roughly 2,550 in Mississippi.[6] Approximately one quarter of American women have an abortion before the age of 45.[7]

The overwhelming weight of medical evidence conclusively demonstrates that abortion is a very safe medical procedure.[8] Complication rates from abortion are extremely low, averaging around 2%, and most complications are minor and easily treatable.[9] Major complications from abortion are exceptionally rare, occurring in just 0.23 to 0.50% of instances across gesta-

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[5] Jones et al., Guttmacher Inst., *Abortion Incidence and Service Availability in the United States, 2017*, at 7 (2019).

[6] Guttmacher Inst., *State Facts About Abortion: Mississippi* (Jan. 2021).

[7] Jones & Jerman, *Population Group Abortion Rates and Lifetime Incidence of Abortion: United States, 2008-2014*, 107 Am. J. Pub. Health 1904, 1908 (2017).

[8] *See, e.g.*, National Academies of Sciences, Engineering, Medicine, *The Safety and Quality of Abortion Care in the United States* 10 (2018) ("*Safety and Quality of Abortion Care*") ("The clinical evidence clearly shows that legal abortions in the United States—whether by medication, aspiration, D&E or induction—are safe and effective. Serious complications are rare.").

[9] *See, e.g.*, Upadhyay et al., *Incidence of Emergency Department Visits and Complications After Abortion*, 125 Obstetrics & Gynecology 175, 181 (2015) (finding 2.1% abortion-related complication rate); *Safety and Quality of Abortion Care* at 55, 60.

tional ages and types of abortion methods.[10] The risk of death from an abortion is even rarer: nationally, fewer than one in 100,000 patients die from an abortion-related complication.[11] In contrast, the "risk of death associated with childbirth [is] approximately 14 times higher."[12] In fact, abortion is so safe that there is a greater risk of complications or mortality for procedures like wisdom-tooth removal, cancer-screening colonoscopy, and plastic surgery.[13]

Nor are there significant risks to mental health or psychological well-being resulting from abortion care. Recent long-term studies have found that women who obtain wanted abortions had "similar or better mental health outcomes than those who were denied a wanted abortion," and that receiving an abortion did not increase the likelihood of developing symptoms associat-

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[10] White et al., *Complications from First-Trimester Aspiration Abortion: A Systematic Review of the Literature*, 92 Contraception 422, 434 (2015).

[11] *See* Jatlaoui et al., *Abortion Surveillance—United States, 2015*, 67 Morbidity & Mortality Weekly Rep. 1, 45 tbl. 23 (2018) (finding mortality rate from 0.00052 to 0.00078% for approximately five-year periods from 1978 to 2014); Zane et al., *Abortion-Related Mortality in the United States, 1998-2010*, 126 Obstetrics & Gynecology 258, 261 (2015) (noting an approximate 0.0007% mortality rate for abortion).

[12] Raymond & Grimes, *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States*, 119 Obstetrics & Gynecology 215, 216 (2012).

[13] ANSIRH, *Safety of Abortion in the United States*, Issue Brief No. 6, at 2 (Dec. 2014); American Soc'y for Gastrointestinal Endoscopy, *Complications of Colonoscopy*, 74 Gastrointestinal Endoscopy 745, 747 (2011); Grazer & de Jong, *Fatal Outcomes from Liposuction: Census Survey of Cosmetic Surgeons*, 105 Plastic & Reconstructive Surgery 436, 441 (2000).

ed with depression, anxiety, post-traumatic stress, or suicidal ideation compared to women who were forced to carry a pregnancy to term.[14]

Moreover, access to abortion remains vital for pregnant patients' overall health and well-being. One recent study noted that 95% of participants believed an abortion had been the "right decision for them" three years after the procedure.[15] The medical community recognizes abortion as a safe and essential component of women's health care.[16]

II. SCIENTIFIC EVIDENCE CONCLUSIVELY DEMONSTRATES THAT A FETUS IS NOT VIABLE AT FIFTEEN WEEKS

This Court has long recognized viability as the critical point of fetal development after which the State's asserted interest in protecting potential fetal life may outweigh a woman's privacy and autonomy interests in terminating her pregnancy. In *Planned Parenthood of*

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[14] Biggs et al., *Women's Mental Health and Well-Being 5 Years After Receiving or Being Denied an Abortion: A Prospective, Longitudinal Cohort Study*, 74 JAMA Psychiatry 169, 177 (2017).

[15] Rocca et al., *Decision Rightness and Emotional Responses to Abortion in the United States: A Longitudinal Study*, 10 PLoS ONE 1, 7 (2015).

[16] *See, e.g.*, Editors of the *New England Journal of Medicine*, the American Board of Obstetrics and Gynecology, et al., *The Dangerous Threat to* Roe v. Wade, 381 New Eng. J. Med. 979 (2019) (stating the view of the Editors of the New England Journal of Medicine along with "several key organizations in obstetrics, gynecology, and maternal-fetal medicine" including the American Board of Obstetrics and Gynecology, that "[a]ccess to legal and safe pregnancy termination ... is essential to the public health of women everywhere"); ACOG, *Abortion Policy* (Nov. 2014, reaff'd Nov. 2020); Soc'y for Maternal-Fetal Med., *Access to Pregnancy Termination Services* (2017).

Southeastern Pennsylvania v. *Casey*, the Court reaffirmed *Roe*'s holding that "[b]efore viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure." 505 U.S. 833, 846 (1992). But it explained that, in weighing a woman's privacy and autonomy interests in obtaining an abortion against the State's asserted interest in protecting potential fetal life, viability is where "the line should be drawn" and "the point at which the balance of interests tips." *Id.* at 860-861, 870.

This Court explained that the balance shifts because viability "is the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb, so that the independent existence of the second life can in reason and all fairness be the object of state protection that now overrides the rights of the woman" and accordingly "there is no line other than viability which is more workable." *Casey*, 505 U.S. at 870. As Justice Blackmun explained in his concurrence in *Webster* v. *Reproductive Health Services*, "[t]he viability line reflects the biological facts and truths of fetal development; it marks the threshold moment prior to which a fetus cannot survive separate from the woman and cannot reasonably and objectively be regarded as a subject of rights or interests distinct from, or paramount to, those of the pregnant woman." 492 U.S. 490, 553 (1989); *see also Roe* v. *Wade*, 410 U.S. 113, 117, 162-163 (1973).

This Court's recognition of viability as a meaningful point in a pregnancy at which the interests at play may shift necessarily reflects an understanding of scientific, medical, and clinical realities. Viability is the capacity of the fetus for prolonged survival outside of the woman's uterus. Once a fetus reaches viability, medical

support alone could sustain it, and its continued existence is no longer entirely dependent on the pregnant patient. As relevant here, there is an undisputed scientific, medical, and clinical consensus that fifteen-weeks LMP is *months* before fetal viability is possible.[17]

In *Casey*, this Court acknowledged that "advances in neonatal care have advanced viability to a point somewhat earlier" than it had been when *Roe* was decided, but explained that "the divergences from the factual premises of 1973 have no bearing on the validity of *Roe*'s central holding," which "in no sense turns on whether viability occurs at approximately 28 weeks, as was usual at the time of *Roe*, at 23 to 24 weeks, as it sometimes does today, or at some moment even slightly earlier in pregnancy, as it may if fetal respiratory capacity can somehow be advanced in the future." 505 U.S. at 860. In 2021, fifteen-weeks LMP remains long before there is any possibility of viability. The Ban therefore admittedly bans abortions long before constitutionally permissible under the framework set forth in *Roe* and *Casey*.[18]

Mississippi attempts to distract from the fact that its Ban unconstitutionally prohibits abortion well before viability by alleging concerns about "fetal pain." But, in asserting any interest in preventing "fetal pain" to justify its fifteen-week ban, Pet. Br. 44, Mississippi

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[17] ACOG, *Abortion Policy* (Nov. 2014, reaff'd Nov. 2020) ("Whether [a fetus is viable] is a medical determination" and "a matter for the judgment of the responsible health care provider.").

[18] *See Casey*, 505 U.S. at 860 ("Whenever [viability] may occur, [its] attainment ... may continue to serve as the critical fact, just as it has done since Roe was decided; which is to say that no change in *Roe's* factual underpinning has left its central holding obsolete, and none supports an argument for overruling it.").

attempts to manufacture a concern that medical consensus rejects as scientifically unfounded. There is no credible scientific evidence of fetal pain perception previability, and certainly none at fifteen weeks LMP, approximately two months before a fetus approaches viability. Every major medical organization that has examined the issue of fetal pain and peer-reviewed studies on the matter have consistently reached the conclusion that pre-viability abortion does not result in fetal pain perception.[19]

The medical consensus is that fetal pain perception is not possible before at least twenty-four weeks gestation because the neural circuitry required to sense, perceive, or experience pain is not developed in earlier gestations. Pain perception requires an intact neural pathway from the periphery of the body (the skin), through the spinal cord, into the thalamus (the gray matter in the brain that relays sensory signals) and on to the region of the cerebral cortex.[20] These neural connections do not develop until after at least twenty-

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[19] *See* ACOG, *Facts Are Important—Fetal Pain* (July 2013); Royal College of Obstetricians and Gynaecologists, *Fetal Awareness: Review of Research and Recommendations for Practice* (Mar. 2010) (concluding fetal pain is not possible before 24 weeks gestation, based on expert panel review of over 50 papers in medical and scientific literature); SMFM et al., *SMFM Consult Series #59: The use of analgesia and anesthesia for maternal-fetal procedures*, Am. J. Obstetrics & Gynecology 4-5 (2021); Apkarian et al., *Human Brain Mechanisms of Pain Perception and Regulation in Health and Disease*, 9 Eur. J. Pain 463 (2005); Lee et al., *Fetal Pain: A Systematic Multidisciplinary Review of the Evidence*, 294 J. Am. Med. Ass'n 947 (2005).

[20] *See, e.g.*, Apkarian et al., 9 Eur. J. Pain at 463-484; Tracey & Mantyh, *The Cerebral Signature for Pain Perception and Its Modulation*, 55 Neuron 377 (2007); Key, *Why Fish Do Not Feel Pain*, 3 Animal Sentience 1 (2016).

four weeks gestation.[21] The scientific evidence therefore demonstrates that an asserted concern about "fetal pain" should have no place in determining the constitutionality of the Ban or the understanding of viability.

III. The Ban Will Harm, Not Improve, Pregnant Patients' Health

The State's health justifications for the Ban equally defy medical consensus. The Ban bars the provision of abortions after fifteen weeks of pregnancy with only narrowly defined exceptions for medical emergencies and severe fetal abnormalities. Miss. Code § 41-41-191(3)(h) & (j); (4)(a) (2018). Physicians and other clinicians could have their professional licenses suspended or revoked for providing an abortion in contravention of the Ban. *Id.* § 41-41-191(6). This Ban—an unconstitutional pre-viability ban on abortion—would cause severe and detrimental physical and psychological health consequences for pregnant patients.

A. The Ban Will Endanger The Physical And Psychological Health Of Pregnant Patients

While individuals who need an abortion want to obtain one as early as they can, there are a variety of reasons some patients may require a pre-viability abortion after the first trimester. Tens of thousands of abortions nationwide are performed at or after 14 weeks' gestation.[22] Because more than 45% of pregnancies in

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[21] Royal College of Obstetricians and Gynaecologists, *Fetal Awareness: Review of Research and Recommendations for Practice*, vii, 8-9 (Mar. 2010); SMFM et al., *SMFM Consult Series #59: The use of analgesia and anesthesia for maternal-fetal procedures*, Am. J. Obstetrics & Gynecology 4-5 (2021).

[22] CDC, *Abortion Surveillance–United States* (Nov. 27, 2020).

the United States are unplanned, and because many medical conditions—including irregular periods—may mask a pregnancy, many women do not discover they are pregnant for several weeks.[23] In fact, one study found that approximately half of those who obtain abortions in their second trimester do so because delays in suspecting and testing for pregnancy caused them to miss the opportunity for an earlier abortion.[24]

After patients become aware of their pregnancies, they may need time to consult with family or health professionals. It often takes time before patients who have decided they need to end their pregnancy can access abortion care given the host of logistical and financial barriers many face, including paying for the procedure, and organizing transportation, accommodation, childcare, and time off from work. Women who have abortions later in pregnancy have been found to "have had difficulty finding an abortion provider," "live farther from the clinic," "be less educated," "have had difficulty arranging transportation," "be unsure of their last menstrual period," and "experience fewer pregnancy symptoms."[25] One recent study found that women receiving first-trimester abortions were delayed in doing so for a variety of reasons: 36.5% due to travel and procedure costs, 37.8% due to not recognizing the pregnancy, 20.3% due to insurance problems, and 19.9% due

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[23] Guttmacher Inst., *Unintended Pregnancy in The United States* (Jan. 2019); Boonstra et al., Guttmacher Inst., *Abortion in Women's Lives* 29 (2006).

[24] Drey et al., *Risk Factors Associated with Presenting for Abortion in the Second Trimester*, 107 Obstetrics & Gynecology 128 (Jan. 2006).

[25] *Id.* at 128.

to not knowing where to find abortion care.[26] Even greater proportions of women needing second-trimester abortions faced these obstacles.[27] These hurdles are accentuated by the fact that in several states—including Mississippi—there is presently only one clinic providing abortions.

The Ban dangerously limits the ability of women at or near fifteen weeks' gestation to obtain the health care they need: some will be forced to travel outside the State to obtain an abortion; others will attempt self-induced abortion; and others still will be forced to carry their pregnancy to term. Each of these outcomes increases the likelihood of negative consequences to a woman's physical and psychological health that could be avoided if care were available.[28]

For instance, being forced to travel outside the State needlessly delays the abortion to later in pregnancy. Though the risk of complications from abortion care overall remains exceedingly low, increasing gestational age results in an increased chance of a major complication—a risk increased further still by continuing a pregnancy to term.[29] The Ban will also increase the possibility that women may attempt self-induced abortions through harmful or unsafe methods.[30] Stud-

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[26] Udapdhyay et al., *Denial of Abortion Because of Provider Gestational Age Limits in the United States*, 104 Am. J. Pub. Health 1687, 1689 (Sept. 2014).

[27] *Id.*

[28] *See, e.g.*, ACOG, Committee Opinion No. 815, *Increasing Access to Abortion* (Dec. 2020).

[29] Upadhyay et al., 125 Obstetrics & Gynecology at 181.

[30] *See, e.g.*, Jones et al., *Abortion Incidence and Service Availability in the United States, 2017*, at 3, 8 (2019) (noting a rise

ies have found that women are more likely to self-induce abortions where they face barriers to reproductive services, and methods of self-induction outside safe medical abortion (i.e., abortion by pill) may rely on harmful tactics such as herbal or homeopathic remedies, intentional trauma to the abdomen, abusing alcohol or illicit drugs, or misusing dangerous hormonal pills.[31]

Those patients who do not—or cannot—obtain an abortion due to the Ban will be forced to carry a pregnancy to term—an outcome with significantly greater risk to maternal health and mortality. The U.S. mortality rate associated with live births from 1998 to 2005 was 8.8 deaths per 100,000 live births,[32] and maternal mortality rates have increased staggeringly since then.[33] In contrast, the mortality rate associated with abortions performed from 1998 to 2005 was 0.6 deaths per 100,000 procedures.[34] A woman's risk of death associated with childbirth is accordingly approximately 14 times higher than any risk of death from an abortion.[35]

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in patients who had attempted to self-manage an abortion, with highest proportions in the South and Midwest).

[31] Grossman et al., Tex. Pol'y Eval. Proj. Res., *Knowledge, Opinion and Experience Related to Abortion Self-Induction in Texas* 3 (2015).

[32] Raymond & Grimes, 119 Obstetrics & Gynecology at 216.

[33] MacDorman et al., *Recent Increases in the U.S. Maternal Mortality Rate: Disentangling Trends from Measurement Issues*, 128 Obstetrics & Gynecology 447 (2016) (finding a 26.6% increase in maternal mortality rates between 2000 and 2014).

[34] Raymond & Grimes, 119 Obstetrics & Gynecology at 216.

[35] *Id.*

In addition to much greater maternal mortality, continued pregnancy and childbirth also entail other substantial health risks for women. Even an uncomplicated pregnancy causes significant stress on the body and involves physiological and anatomical changes. Moreover, continuing a pregnancy to term can exacerbate underlying health conditions or cause new conditions. For example, approximately 6 to 7% of pregnancies are complicated by gestational diabetes mellitus, a condition in which carbohydrate intolerance develops during pregnancy and which frequently leads to maternal and fetal complications, including developing diabetes later in life.[36] Another complication is preeclampsia, a disorder associated with new-onset hypertension that occurs most often after 20 weeks of gestation and can result in blood pressure swings, liver issues, and seizures, among other conditions.[37] Labor and delivery are likewise not without significant risk, including that of hemorrhage, placenta accreta spectrum, hysterectomy, cervical laceration, and debilitating postpartum pain, among others.[38] Approximately one in three women who give birth in the United States do so by cesarean delivery, a major procedure that carries in-

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[36] ACOG Practice Bulletin No. 190, *Gestational Diabetes Mellitus* (Feb. 2018).

[37] ACOG Practice Bulletin No. 222, *Gestational Hypertension and Preeclampsia* (Dec. 2018).

[38] ACOG Practice Bulletin No. 183, *Postpartum Hemorrhage* (Oct. 2017); ACOG Obstetric Care Consensus, *Placenta Accreta Spectrum* (July 2012, reaff'd 2021); ACOG Practice Bulletin No. 198, *Prevention and Management of Obstetric Lacerations at Vaginal Delivery* (Sept. 2018); ACOG Clinical Consensus No. 1, *Pharmacologic Stepwise Multimodal Approach for Postpartum Pain Management* (Sept. 2021).

creased risk of complications.[39] Finally, evidence suggests that women denied abortions because of gestational age limits are more likely to experience negative psychological health outcomes—such as anxiety, lower self-esteem, and lower life satisfaction—than those women who obtained a needed abortion.[40] Accordingly, as a medical and scientific matter, the fifteen-week ban is detrimental to women's physical and psychological health and well-being.[41]

B. There Is No Health Or Safety Justification For The Fifteen-Week Ban

Similar to its disregard of the greater risks of forcing patients to continue a pregnancy, the State's affirmative attempt to justify the Ban as a means of "protecting the health of women" is scientifically baseless. Pet. Br. 7-8; Miss. Code § 41-41-191. In enacting the Ban, the Legislature relied on a single study to conclude that abortion "carries significant physical and psychological risks to the maternal patient." Pet. Br. 8.; Miss. Code § 41-41-191. But the State ignores the rest of that study's findings—which show that, although the risks of abortion marginally increase as pregnancy progresses, abortion is exceedingly safe throughout pregnancy and comparatively safer than

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[39] CDC, National Vital Statistics Reports Vol. 70, No. 2, *Births: Final Data for 2019* (2021); ACOG, Obstetric Care Consensus No. 1, *Safe Prevention of the Primary Cesarean Delivery* (Mar. 2014, reaff'd 2016).

[40] Biggs et al., 74 JAMA Psychiatry at 172.

[41] *Safety and Quality of Abortion Care* at 74 (noting that the greatest threats to the safety and quality of abortion in the U.S. are unnecessary regulations that restrict access to abortion).

continued pregnancy and childbirth[42]—as well as the conclusions of the broader scientific and medical community, and decades of clinical experience.

Contrary to the State's assertion, the overwhelming weight of medical consensus finds induced abortion is one of the least risky procedures in modern medicine and is several times safer than the only alternative—carrying a pregnancy to term and giving birth.[43] Moreover, every complication associated with abortion, including anemia, hypertensive disorders, and pelvic and perineal trauma is "more common among women having live births than among those having abortions."[44]

As discussed above (*see supra* pp.17), although the risk of complications does increase somewhat as pregnancy progresses, the absolute risk of complications associated with an abortion remains exceedingly low across all gestational ages and methods.[45] There are a variety of reasons why abortion carries a comparatively greater risk of complications as pregnancy progresses, including that abortions in the second trimester typical-

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[42] Bartlett et al., *Risk Factors for Legal Induced Abortion-Related Mortality in the United States*, 103 Obstetrics & Gynecology 729 (2004).

[43] *Id.* at 729; *see also supra* notes 8-14 and accompanying text.

[44] Raymond & Grimes, 119 Obstetrics & Gynecology at 216-217; *see also* Bruce et al., *Maternal Morbidity Rates in a Managed Care Population*, 111 Obstetrics & Gynecology 1089, 1092 (2008) ("Rates of anemia, hypertensive disorders of pregnancy, pelvic and perineal trauma, excessive vomiting, and postpartum hemorrhage each occurred more frequently in women who had a live birth or stillbirth.").

[45] *See supra* notes 8-14 and accompanying text.

ly require more involved procedures and more sedation than procedures in the first trimester.[46]

The medical community has not, however, recommended any pre-viability limits—rather, it has recommended, as the study the State relies on explains, "increased access to surgical and nonsurgical abortion services" as they "may increase the proportion of abortions performed at lower-risk, early gestational ages."[47] This conclusion is consistent with a recent study published by the National Academies of Medicine, Engineering, and Science showing that the greatest threats to the safety and quality of abortion in the United States are unnecessary government regulations that restrict access to abortion.[48]

Similarly, there is no support for the State's proposition that abortion "carries significant ... psychological risks." Pet. Br. 7-8 (quotation marks omitted); Miss. Code § 41-41-191. In fact, the "highest-quality research available does *not* support the hypothesis that abortion leads to long-term mental health problems."[49] In the context of unplanned pregnancies, high-quality recent studies have found no long-term difference in the risk of

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[46] *Safety and Quality of Abortion Care* at 10.

[47] Bartlett et al., 103 Obstetrics & Gynecology at 736; *see also* ACOG, Committee Opinion No. 815, *Increasing Access to Abortion* (Dec. 2020).

[48] *Safety and Quality of Abortion Care.*

[49] Charles et al., *Abortion and Long-Term Mental Health Outcomes: A Systematic Review of the Evidence*, 78 Contraception 436, 448-449 (July 2008) (emphasis added); *see also* Biggs et al., *Mental Health Diagnoses 3 Years After Receiving or Being Denied an Abortion in the United States*, 105 Am. J. Pub. Health 2257, 2561 (2015) (finding that obtaining an abortion does not correlate with higher rates of diagnoses of mental health disorders).

experiencing symptoms of posttraumatic stress, depression, or anxiety, or of experiencing lower self-esteem or life satisfaction between women who have abortions and those who carry their pregnancy to term.[50] Instead, evidence indicates that being denied a wanted abortion can have a *detrimental* impact on women's mental health.[51] In short, contrary to the State's claim, the fifteen-week ban will not advance or protect women's health; rather it will cause physical and psychological harm for pregnant women. The State's claim that the Ban promotes the health of pregnant women is simply without legitimate scientific basis.

C. The Narrow Medical Emergency Exception Does Not Adequately Protect Patients' Health

Under the Ban, a physician may perform an abortion after fifteen weeks only in cases involving a "medical emergency" or "severe fetal abnormality." Miss. Code § 41-41-191. The Ban narrowly defines a "medical emergency" as a condition when "an abortion is necessary to preserve the life of the pregnant woman" or when pregnancy will create a "serious risk of substantial and irreversible impairment of a major bodily func-

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[50] Biggs et al., 74 JAMA Psychiatry at 177.

[51] *Id.* at 172 (finding that a week after seeking an abortion, women denied abortion because of gestational age limits are significantly more likely to report symptoms of anxiety than women who receive an abortion); *id.* (finding that depression and anxiety in women who had abortions declined following the abortion, but that in women who were denied abortions and subsequently gave birth those symptoms remained); Biggs et al., *Does Abortion Reduce Self-Esteem and Life Satisfaction?*, 23 Quality of Life Research 2505 (2014) (finding that women who received an abortion experienced higher self-esteem than women who were denied an abortion).

tion." *Id.* This accordingly forecloses an abortion for women who might face serious medical complications that, while posing grave risks to their health, are not urgent or extreme enough in the State's narrow view to fall within the Act's medical emergency exception.

There are a significant number of serious medical conditions that may not qualify as a "medical emergency" under the Ban's narrow definition but would nevertheless jeopardize a patient's health. These include, but are not limited to: Alport syndrome (a form of kidney inflammation), valvular heart disease (abnormal leakage or partial closure of a heart valve that can occur in patients with no history of cardiac symptoms), lupus (a connective tissue disorder that may suddenly worsen during pregnancy and lead to blood clots and other serious complications), pulmonary hypertension (increased pressure within the lung's circulation system that can escalate during pregnancy), and diabetes (which can worsen to the point of causing blindness as a result of pregnancy).[52] The Ban also makes no exception for women who may have experienced conditions constituting a "medical emergency" in previous pregnancies and now seek to terminate a subsequent pregnancy to avoid future life-threatening complications. Moreover, the Ban makes no allowances for mental health issues that might put a woman's health and life

[52] *See* Matsuo et al., *Alport Syndrome and Pregnancy*, 109 Obstetrics & Gynecology 531, 531 (Feb. 2007); Stout & Otto, *Pregnancy in Women with Valvular Heart Disease*, 93 Heart Rev. 552, 552 (May 2007); Cortes-Hernandez et al., *Clinical Predictors of Fetal and Maternal Outcome in Systemic Lupus Erythematosus: A Prospective Study of 103 Pregnancies*, 41 Rheumatology 643, 646-647 (2002); Kiely et al., *Pregnancy and Pulmonary Hypertension; A Practical Approach to Management*, 6 Obstetric Med. 144, 153 (2013); Greene & Ecker, *Abortion, Health and the Law*, 350 New Eng. J. Med. 184, 184 (2004).

at risk if the pregnancy is not terminated.[53] Any of these conditions can progress and become more serious or lead to additional health risks if abortion care is not available.

It is untenable to force a pregnant patient to wait until her medical condition escalates to the point that "an abortion is necessary to preserve [her] life" or her pregnancy creates "serious risk of substantial and irreversible impairment of a major bodily function" before being able to seek potentially life-saving care. Miss. Code § 41-41-191. Nor should physicians be put in the impossible position of either letting a patient deteriorate until one of these conditions is met or face possible loss of their medical licenses for performing an abortion in contravention of the Ban. In forcing physicians to wait until a patient is close enough to death that they will risk their license to practice medicine to save her life by providing needed abortion care, the State indefensibly jeopardizes patients' health.

D. The Ban Will Hurt Rural, Minority, And Poor Patients The Most

The Ban will disproportionality impact people of color, those living in rural areas, and those with limited economic resources. This is because, as a general matter, 75% of those seeking abortion are living at or below 200% of the federal poverty level, and the majority of patients seeking abortions identify as Black, Hispanic,

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[53] Miss. Code § 41-41-191 (2018) ("medical emergency" defined as when "life is endangered by a physical disorder, *physical* illness, or *physical* injury" (emphasis added)); *see also, e.g.*, Mangla et al., *Maternal Self-Harm Deaths: An Unrecognized and Preventable Outcome*, 221 Am. J. Obstetrics & Gynecology 295 (2019).

Asian, or Pacific Islander.[54] Similarly, traveling out of State for medical care is more difficult, if not impossible, for patients with limited means or geographic remoteness.

The inequities continue after an abortion is denied. As explained *supra* pp.18-20, forcing patients to continue pregnancy increases their risk of complications, and the risk of death associated with childbirth is approximately 14-times higher than that associated with abortion. Nationwide, Black women's pregnancy-related mortality rate is 3.2 times higher than that of white women, with significant disparities persisting even in areas with the lowest overall rates and among women with higher levels of education.[55] Indeed, Black women in Mississippi are nearly three times more likely to die from pregnancy-related causes than white women, making carrying an unwanted pregnancy to term disproportionately dangerous for them.[56] The Ban thus exacerbates inequities in women's health and health care, negatively affecting the most vulnerable Mississippians.

IV. THE BAN FORCES CLINICIANS TO MAKE AN IMPOSSIBLE CHOICE BETWEEN UPHOLDING THEIR ETHICAL OBLIGATIONS AND FOLLOWING THE LAW

Pre-viability abortion bans such as the one at issue in this case violate long-established—and widely accepted—principles of medical ethics and intrude upon

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[54] Jerman et al., Guttmacher Inst., *Characteristics of U.S. abortion patients in 2014 and changes since 2008* (2016).

[55] CDC, *Racial and Ethnic Disparities Continue in Pregnancy-Related Deaths* (Sept. 5, 2019).

[56] Mississippi State Department of Health, *Mississippi Maternal Mortality Report* (Apr. 2019).

the foundation of the patient-physician relationship: honest, open communication. Such bans require medical professionals to violate the age-old principles of beneficence, non-maleficence, and respect for patient autonomy in order to avoid negative personal and professional consequences such as having their licenses to practice medicine revoked. Miss. Code § 41-41-191(6). It is pre-viability abortion bans—not the ability to perform safe abortions before a fetus could ever survive outside the womb—that threaten the medical profession's integrity. *See* Pet. Br. 5 (framing the Ban as furthering Mississippi's interest in "protecting ... the medical profession's integrity").

A. The Ban Undermines The Patient-Physician Relationship

Patient safety is of paramount importance to amici. While some regulation of medical practice is necessary to protect patient safety, legislation that substitutes lay lawmakers' views for a physician's expert medical judgment impermissibly interferes with the patient-physician relationship and poses grave dangers to patient well-being. ACOG's *Code of Professional Ethics* states that "the welfare of the patient must form the basis of all medical judgments" and that obstetrician-gynecologists should "exercise all reasonable means to ensure that the most appropriate care is provided to the patient."[57] Likewise, the AMA *Code of Medical Ethics* places on physicians the "ethical responsibility to place patients' welfare above the physician's own self-interest or obligations to others."[58]

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[57] ACOG, *Code of Professional Ethics* 2 (Dec. 2018).

[58] AMA, *Code of Medical Ethics Opinion 1.1.1.*

The patient-physician relationship is critical for the provision of safe and quality medical care.[59] At the core of this relationship is the ability to counsel frankly and confidentially about important issues and concerns based on patients' best medical interests, and with the best available scientific evidence.[60] Amici oppose laws that threaten the patient-physician relationship absent a justifiable health reason. "Laws ... that require physicians to give, or withhold, specific information when counseling patients, or that mandate which tests, procedures, treatment alternatives or medicines physicians can perform, prescribe, or administer are ill-advised."[61] Laws should not interfere with the ability of physicians to offer appropriate treatment options to their patients without regard for their own self-interests.

By prohibiting pre-viability abortions, the Ban interferes with the patient-physician relationship. For example, if a patient's health were compromised, but the fetus was at approximately fifteen-weeks LMP, the Ban would only allow a physician to perform an abortion if the threat to the patient's health rose to a legislatively defined "medical emergency," regardless of the

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[59] ACOG, *Statement of Policy, Legislative Interference with Patient Care, Medical Decisions, and the Patient-Physician Relationship* (May 2013, reaff'd and amended August 2021) ("*ACOG, Legis. Policy Statement*").

[60] AMA, *Patient-Physician Relationships, Code of Medical Ethics Opinion 1.1.1* ("The relationship between a patient and a physician is based on trust, which gives rise to physicians' ethical responsibility to place patients' welfare above the physician's own self-interest or obligations to others, to use sound medical judgment on patients' behalf, and to advocate for their patients' welfare.").

[61] *ACOG, Legis. Policy Statement, supra* note 59.

overall medical advisability of the procedure or the desire of the patient. Miss. Code § 41-41-191(3). The Ban defines a qualifying "medical emergency" to mean that the pregnant patient's life must be "endangered by a physical disorder, physical illness, or physical injury ... or when the continuation of the pregnancy will create a serious risk of substantial and irreversible impairment of a major bodily function." *Id.* (3)(j). A physician and patient together may conclude that an abortion was in the patient's best medical interests even though the risk posed by continuing the pregnancy does not rise to the level of immediately life threatening or risking substantial and irreversible physical impairment of a major bodily function. The Ban thus forces physicians to choose between the ethical practice of medicine or obeying the law.[62]

B. The Ban Violates The Principles Of Beneficence And Non-Maleficence

Beneficence, the obligation to promote the well-being of others, and non-maleficence, the obligation to do no harm and cause no injury, have been the cornerstones of the medical profession since the Hippocratic traditions nearly 2500 years ago.[63] Both of these principles arise from the foundation of medical ethics which

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[62] *Cf. AMA, Patient Rights, Code of Medical Ethics Opinion 1.1.3* ("Patients should be able to expect that their physicians will provide guidance about what they consider the optimal course of action for the patient based on the physician's objective professional judgment.").

[63] AMA *Principles of Medical Ethics* (rev. June 2001); ACOG, Committee Opinion No. 390, *Ethical Decision Making in Obstetrics and Gynecology* 1, 3 (Dec. 2007, reaff'd 2016).

requires that the welfare of the patient forms the basis of all medical decision-making.[64]

Obstetricians, gynecologists, and other clinicians providing abortion care respect these ethical duties by engaging in patient-centered counseling, providing patients with information about risks, benefits, and pregnancy options, and ultimately empowering patients to make a decision informed by both medical science and their individual lived experiences.[65]

The fifteen-week ban compromises these principles and practices by pitting physicians' interests against those of their patients. If a clinician concludes that an abortion is medically advisable, the principles of beneficence and non-maleficence require the physician to recommend that course of treatment. And if a patient decides that an abortion is the best course of action, those principles require the physician to provide, or refer the patient for, that care. But the fifteen-week ban and its extremely narrow medical exception prohibits physicians from providing that treatment after fifteen weeks and exposes physicians to significant penalties if they do so. The fifteen-week ban therefore places physicians in the ethical dilemma of choosing between providing the best available medical care and risking substantial penalties or protecting themselves personally. This decision, between possible loss of the ability to practice medicine and the practice of scientific, ethical, high-

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[64] ACOG, *Code of Professional Ethics* 2 (Dec. 2018); AMA, *Code of Medical Ethics Opinion 1.1.1.*, *supra* note 58 and accompanying text.

[65] ACOG, Practice Bulletin No. 162: *Prenatal Diagnostic Testing for Genetic Disorders*, 127 Obstetrics & Gynecology e108 (May 2016).

quality health care is one that challenges the very core of the Hippocratic Oath: "Do no harm."

C. The Ban Violates The Ethical Principle Of Respect For Patient Autonomy

Another core principle of medical practice is patient autonomy—the respect for patients' ultimate control over their bodies and right to a meaningful choice when making medical decisions.[66] Patient autonomy revolves around self-determination, which, in turn, is safeguarded by the ethical concept of informed consent and its rigorous application to a patient's medical decisions.[67] The fifteen-week ban would deny patients the right to make their own choices about health care if they decide they need, for example, to seek a previability abortion after fifteen weeks.

By undermining the patient-physician relationship, violating the principles of beneficence and nonmaleficence, and threatening clinicians' ability to respect patient autonomy, the Ban harms both the ethical practice of medicine and patient health and safety. Therefore, contrary to the State's assertion (at 5) that the Ban will "protect[] ... the medical profession's integrity," it will undermine the practice of medicine. The integrity of the medical profession is *not* protected by preventing physicians from utilizing their extensive training and reliance on medical evidence to safely perform a routine procedure that a patient has made an

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[66] ACOG, *Code of Professional Ethics* 1 (Dec. 2018) ("respect for the right of individual patients to make their own choices about their health care (*autonomy*) is fundamental").

[67] ACOG, Committee Opinion No. 819, *Informed Consent and Shared Decision Making in Obstetrics and Gynecology* (Feb. 2021); AMA, *Code of Medical Ethics Opinion 2.1.1.*

informed decision is in her own best interest. Instead, the medical profession's integrity is safeguarded when physicians are permitted to exercise their duty to counsel and care for patients based on "objective professional judgment" and ultimately respect patients' autonomy to make decisions about their own bodies and health.[68]

CONCLUSION

For the foregoing reasons, amici urge this Court to affirm the Fifth Circuit's decision.

Respectfully submitted.

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[68] AMA, *Patient Rights, Code of Medical Ethics Opinion 1.1.3.*

CAPTURED COURTS

The Republican Judicial Assault on Reproductive Rights

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Sept. 2021

Democratic Policy & Communications Committee

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OVERVIEW

Last September, Senate Democrats issued a report describing how court capture by far-right dark money groups threatens millions of Americans' access to abortion and other reproductive care. We warned that Justice Amy Coney Barrett's rushed confirmation would put reproductive rights in jeopardy for a generation. One year later, those warnings have proven frighteningly accurate. Earlier this month, five Republican Justices voted in the dead of night to allow Texas's flagrantly unconstitutional abortion ban, S.B. 8, to take effect through the "shadow docket." As a result, almost all abortion care in Texas has come to an abrupt stop. Next term, in *Dobbs v. Jackson Women's Health Organization*, the Court will reconsider whether pre-viability abortion bans are constitutional, despite clear precedents settling that question. Even if the Court nominally leaves these precedents in place, it will almost certainly diminish their scope and effect.

With reproductive rights under direct attack, we must act. Congress must enact measures to protect abortion access, including by passing the Women's Health Protection Act of 2021. We must also expose and combat the influence of special interest groups that have spent years stacking the courts with anti-abortion judges. Passing the Judicial Ads Act—now incorporated into the DISCLOSE Act, the For the People Act, and Freedom to Vote Act—would ensure greater transparency by requiring that groups that spend money on ads supporting or opposing judicial nominees disclose their donors. While it falls on Congress to pass these laws, all Americans committed to freedom, justice, and equality must join this urgent fight.

How did we get here?

For decades, a network of dark money groups have invested tens of millions of dollars with the goal of overturning *Roe v. Wade* and *Planned Parenthood v. Casey*.[1] Koch-funded groups like **Concerned Women for America** (CWA), **Americans United for Life** (AUL), and the **Judicial Crisis Network** (JCN) have drafted anti-abortion legislation for state legislatures and funded ad campaigns to support the confirmation of anti-abortion judges and justices.[2]

Last year, this campaign culminated in Justice Amy Coney Barrett's partisan confirmation to the Supreme Court just eight days before Republicans lost control of both the Senate and White House in the 2020 election. Dark-money groups spent tens of millions of dollars to jam her nomination through[3] because she is reliably anti-abortion.[4] Among others, **JCN** spent $10 million, and Koch-backed **Americans for Prosperity** launched a "seven-figure" campaign supporting Justice Barrett's confirmation.[5]

After stacking the federal judiciary with anti-abortion judges groomed and vetted by the far-right **Federalist Society**, anti-abortion groups have built a receptive audience for their campaign. They have made the most of it by crafting their most insidious anti-abortion law yet. Texas's S.B. 8, drafted by former Scalia clerk and Federalist Society lawyer Jonathan Mitchell,[6] bans abortion care after approximately six weeks into pregnancy. In order to evade constitutional protections and the judicial system, it outsources enforcement of the law to private parties by offering $10,000 bounties for a successful suit against anyone who provides abortion care or helps a person seek an abortion in defiance of the law.[7]

Texas's S.B. 8
Outsources enforcement of the law to private parties by offering $10,000 bounties for a successful suit against anyone who helps a person seek an abortion in defiance of the law.

Jonathan F. Mitchell

Prior to devising S.B. 8, Mitchell spearheaded anti-union litigation, working jointly with the **Freedom Foundation**, which is a member of **State Policy Network**.[8]

As Supreme Court Justice Sonia Sotomayor noted, this law is "flagrantly unconstitutional" under existing Court precedents.[9] But anti-abortion judges on the 5th Circuit Court of Appeals and five Republican-appointed justices on the Court allowed the law to go into effect using the shadow docket. The move was so radical that not even Chief Justice Roberts—himself no friend of reproductive rights—would sign on.[10]

The Shadow Docket

The "shadow docket" refers to Supreme Court orders handed down outside of its typical "merits" docket. Unlike the merits docket, shadow docket orders are usually issued on limited timelines, with little time for briefs and without oral arguments. Shadow docket decisions are often unsigned, offer little to no explanation, and published in the dead of night. Historically, emergency requests made on the docket are intended to preserve the status quo while a case is working its way through the lower courts, but the Roberts Court has weaponized the shadow docket to disturb the status quo and allow harmful—and sometimes, irreversible—policies to take effect.

During the Trump administration, the Court repeatedly used the shadow docket to overturn lower court injunctions against the administration, and to speed up Trump's priorities. Now that President Biden is in office, however, the Republican justices have changed their approach, deploying the shadow docket to gut constitutional rights—in this case, letting a plainly unconstitutional abortion ban go into effect. The Court spent less than three days dealing with the case. There were no oral arguments. The majority opinion was unsigned and one paragraph long. As Justice Kagan wrote in her dissent, the Court's shadow docket decision making "every day becomes more unreasoned, inconsistent, and impossible to defend."[11]

"The majority's decision is emblematic of too much of this court's shadow-docket decision making — which every day becomes more unreasoned, inconsistent and impossible to defend."

Justice Elena Kagan, dissenting in Whole Woman's Health v. Jackson

What Texas's Abortion Ban Means

Texas has almost seven million women aged 15 to 49, out of a total of 75 million in the entire country, equaling one in 10 U.S. women of reproductive age.[12] S.B. 8 bans abortion care approximately six weeks into pregnancy, before many people even know they're pregnant—meaning abortion care has been pushed almost entirely out of reach for one in 10 U.S. women of reproductive age.

As we noted in our report last year, Republicans' sustained attacks on abortion access harm Americans' health outcomes, financial security, and ability to decide their life's course, especially for those who are struggling to make ends meet, those living in rural areas, and people of color. According to new research from the Guttmacher Institute, the average one-way driving distance for pregnant Texans seeking an abortion will now increase 14-fold, from 17 miles to 247 miles.[13] Given the additional costs associated with traveling out of state for care—including hotel stays, transportation, childcare, and lost wages, among others—this abortion ban will mean that many will not be able to get this care at all.

What's Next & The Bigger Picture

Even before the Texas case, state lawmakers, emboldened by the new makeup of the Supreme Court and the over 230 Trump-appointed federal judges, were rushing to enact more abortion restrictions. According to the Guttmacher Institute, over 500 abortion restrictions have been introduced this year across 47 states, and over 90 of those have already been passed and signed, including 11 bans on abortion.[14]

By allowing S.B. 8 to go into effect, the Court sent a signal about how little these justices respect reproductive rights, precedent, or "judicial restraint," and just how far they will go to enact the agenda of the donors who put them on the Court. Already, Republican leaders in at least eleven states are looking to copy Texas's abortion ban.[15]

This term, the Republican justices are poised to further erode *Roe* and *Casey* in *Dobbs v Jackson Women's Health Organization*. *Dobbs* involves a Mississippi law banning abortions after 15 weeks of pregnancy, in direct violation of the core holding of *Roe*, which protects a person's right to abortion prior to fetal viability. Mississippi's brief to the Court explicitly asks the Court to overrule *Roe* and *Casey*, a position loudly echoed by congressional Republicans. Mississippi's law was drafted by a group that is a member of **State Policy Network** and that has received significant funding from **Donors Capital Fund**, the "dark money ATM of the conservative movement" tied to the Koch family.[16] Groups such as **JCN** and Koch-backed **Americans for Prosperity** that spent millions to confirm Justices Gorsuch, Kavanaugh, and Barrett expect a return on their investment.[17]

What We Can Do

Congress should act now to protect abortion access, including by passing the Women's Health Protection Act of 2021. This bill would establish a statutory right for health care professionals to provide abortion care and the right for their patients to receive care, free from bans and medically unnecessary restrictions that single out abortion care.

The Women's Health Protection Act

*Establishes a **statutory right** for health care professionals to **provide abortion care** and the right for their patients to **receive care***

Congress should also pass measures, such as the Judicial Ads Act, to combat dark money-influence over judicial nominations. Groups like the **Federalist Society** and **Judicial Watch** have used a $400 million judicial-influence machine to support right-wing policies and select judges.[18] The Judicial Ads Act would require identification of donors who fund advocacy campaigns aimed at confirming their favored nominees. Currently, anonymous money spent on judicial nominations is not subject to any disclosure requirements. Without more disclosure, the public has no way of knowing whether wealthy donors and groups advocating for certain policy changes are the same entities that are spending money to support or oppose a judicial nomination.

The time for warnings is over. Now is the time to act.

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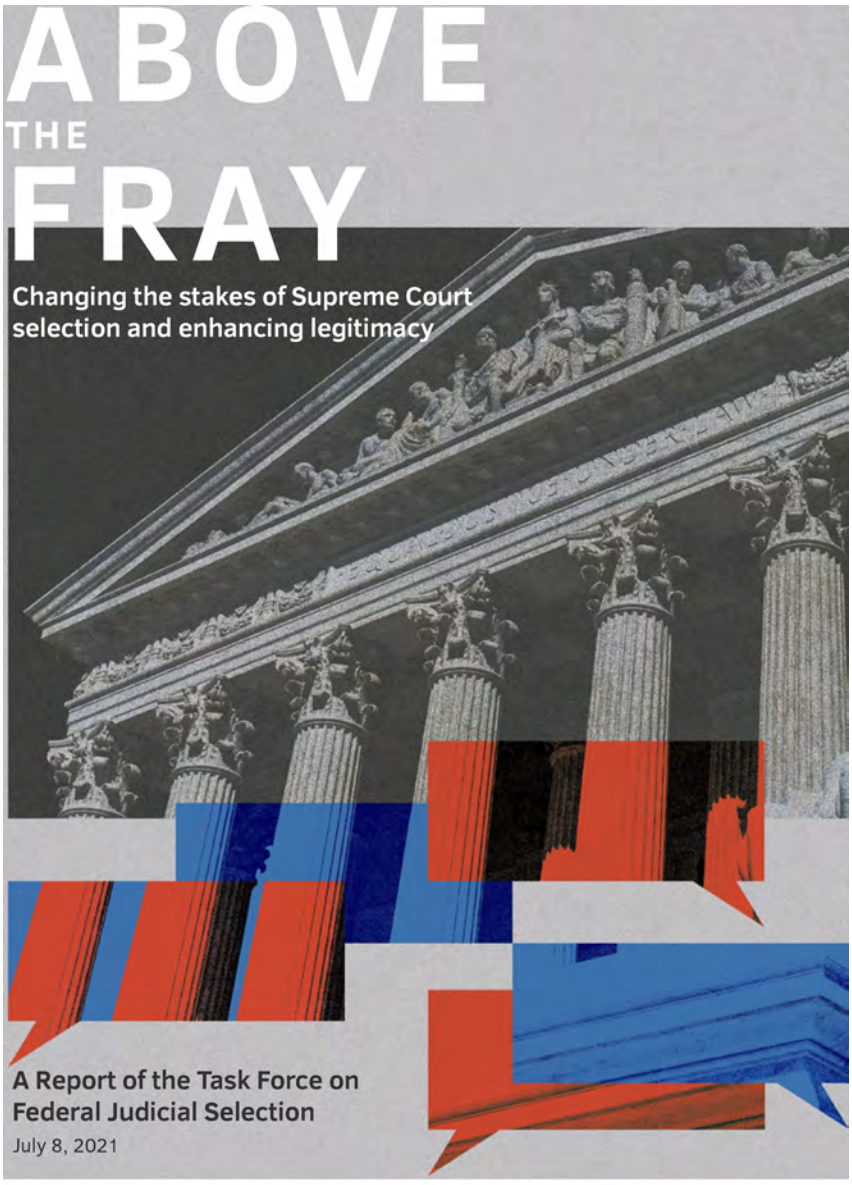
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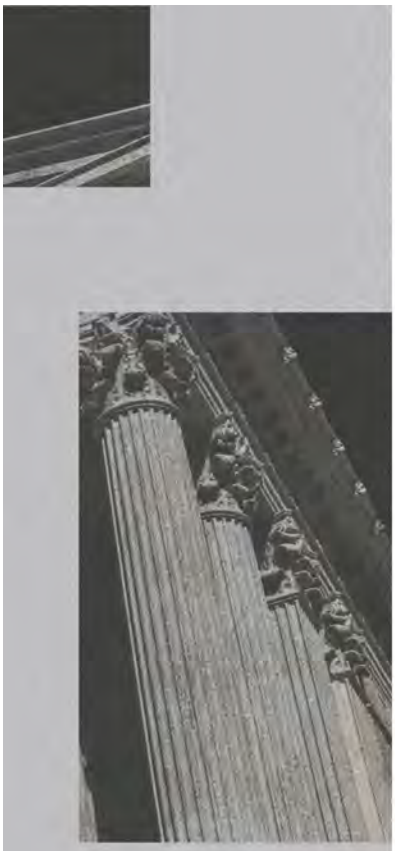
FRAY
Changing the stakes of Supreme Court selection and enhancing legitimacy
A Report of the Task Force on Federal Judicial Selection
July 8, 2021



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THE PROJECT ON GOVERNMENT OVERSIGHT (POGO) is a nonpartisan independent watchdog that investigates and exposes waste, corruption, abuse of power, and when the government fails to serve the public or silences those who report wrongdoing.

We champion reforms to achieve a more effective, ethical, and accountable federal government that safeguards constitutional principles.

Task Force on Federal Judicial Selection

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Our Values

We are a small task force of people with diverse backgrounds and points of view who have come together to seek common ground in addressing the structural challenges facing the Supreme Court. Among us, we have experience as jurists on state and federal courts and as scholars of the judicial and legislative branches.

What brought us together is a shared commitment to fair and excellent judging. We know that our state and federal courts play a vital role in protecting rights, ensuring equality of treatment, respecting the dignity of individuals, promoting economic stability, and responding to allegations of government misconduct. Our hope is that the judges selected to serve on courts will rise above the political fray surrounding the appointment process and adjudicate cases fairly and independently.

The Problems

The political stakes of judicial selection, especially at the Supreme Court level, have cast a shadow over the integrity of that process. The U.S. Constitution commits the responsibility of judicial selection to the President and Senate, which makes politics an inherent part of the process. But, under the present system, partisans have incentives to control the composition of the courts so as to try to affect the resolution of disputes in a way that furthers particular policy objectives and politics. This process distorts the actual and the perceived fairness and independence of the courts.

A variety of factors, weighted differently among us, make the stakes of federal judicial confirmation so high. On the Supreme Court, under the current structure, vacancies are rare and erratic. Therefore, a handful of people hold the power of that office for a long time. In contrast to earlier eras, today's justices have virtually total control over which cases to hear. In recent years, the Court has relied more on forms of rapid decision-making that do not provide full development of the factual and legal issues, and, in some cases, the Court has not provided an explanation when dispositions are made. Problems of process and transparency have therefore become acute.

Judges on the district and appellate courts are at the center of federal adjudication, and once appointed, they are likewise at the forefront for consideration for the U.S.

Supreme Court. Given their life-time authority and the importance of their work, the process for selecting those judges also merits review.

And finally, the current concentration of power on the Supreme Court also underscores the importance of a robust and functioning ethical framework to govern the conduct of the justices, transparency in the Court's decision-making, and improved access to its public proceedings.

In this report, we address the interrelated concerns of the selection of judicial nominees, the procedures for decision-making on the Supreme Court, the duration of service on the Court, and conduct while on the bench. Our reasons for recommending interactive reforms, and specific changes that we believe deserve consideration, are detailed below.

A Holistic Approach

This task force has spent many months discussing how to be helpful amidst the heated discussions about the role of the federal judiciary and appointments to the bench.

Our packet of proposed reforms aims to alter some of the incentives that drive the current dysfunction. The U.S. Constitution requires the President to nominate federal judges with the advice and consent of the Senate. Further, the Constitution provides for judicial independence through protecting salaries and service during "Good Behavior."[1]

But the Constitution does not set out criteria for selection of Supreme Court justices, and it does not speak to the number of justices on the Court, the place in which they sit while holding office, or their processes for decision-making. Our inquiry primarily focuses on how to adjust those aspects to try to lower the heat of nominations by altering the stakes of each individual's selection. Judges and justices must be understood as public servants committed to a fair and impartial review of the facts and the law, and we believe that our approach will help advance that vital purpose.

Of course, the federal judiciary is embedded in a system of government, and many are concerned about the dysfunctions of the legislative and executive branches and how to maintain a robust democracy at both the state and national levels. Our focus is on the judiciary, and our view is that responses to the current problems require reconsidering how judges are selected, how power is distributed during their tenure, how long they serve in particular roles, and their obligations to be transparent and adhere to the highest ethical standards.

Dozens of proposals have been put forth in decades past and more are in view now. In this report, we blend some of these proposals together to encourage a holistic approach. The process of designing institutions that reflect and safeguard the values of our democratic society is just that—a process. There is no single solution, and reasonable people can disagree about how to move forward. In our view, at this point in time, a multi-faceted packet of reforms *interacting together* would modify political incentives to reduce the excessive tensions that accompany the current process.[2] This package of reforms aims to protect judicial independence and support judges focused on deciding cases based on the facts before them, the relevant legal principles, and the country's need for fair and just decision-making.

A Package of Reforms to Lower the Stakes and Enhance Legitimacy

Despite enormous changes in the country and in the lower courts, the Supreme Court's structure has not changed for nearly a century. Because what once worked appears now no longer to be the best approach, a package of reforms to alter the concentration of power and enhance the legitimacy of the Court's decision-making needs to address a series of issues:

1. **Selection for service on the federal courts;**
2. **The structure of decision-making in the Supreme Court;**
3. **The length of judicial service; and**
4. **Judicial conduct, including ethical obligations, transparent decision-making, and access to the Supreme Court's public proceedings**

The proposals we discuss are built from experiences with the lower federal courts, state courts, and other constitutional democracies that are likewise committed to judicial independence, as well as ideas and proposals of many others who have also sought to mitigate the problems of the current system.

Although we may not agree on each individual proposal, we are unanimous in seeking fundamental change and agree that consideration of all of these recommendations is helpful to understanding the problems and useful responses. Our purpose here is not to mine the methods and details on implementation, but rather to sketch the larger picture. Some changes we suggest could come by the Supreme Court changing its own practices, others would require Congress to enact legislation and could, depending on different interpretations of Article III of the U.S. Constitution, require constitutional amendments.

1. SELECTION FOR SERVICE ON THE COURTS

A threshold question for any reform agenda is how to recruit and screen judicial candidates. Because the Constitution empowers the President and the Senate to select life-tenured federal judges, we endorse the use of screening committees, working in a transparent fashion, to assess and recommend judicial candidates based on specified and objective qualifications.

This method is familiar because it is in use in many jurisdictions, and our endorsement comes from that experience. Screening mechanisms for federal judges date back at least to the 1970s, when President Jimmy Carter created a national committee to identify nominees for the appeals courts and encouraged senators to create their own committees to screen district court nominees.[3] Although no other President has replicated President Carter's model, many senators continue to use screening committees. One count records 43 senators from 21 states, as well as representatives of the District of Columbia, who use screening committees to assist with the federal judicial nomination process.[4]

A similar process is currently in use *within* the Article III judiciary when it selects individuals to join life-tenured judges and serve as bankruptcy judges and magistrate judges. Congress has empowered appellate judges to select bankruptcy judges[5] and

has authorized district court judges to select magistrate judges.[6] At both levels, screening committees typically identify a list of candidates from which life-tenured judges select.[7]

Parallel processes occur in many states. About two-thirds of the states, joined by the District of Columbia, rely on forms of screening committees to evaluate judicial nominees.[8] In some jurisdictions, that process is legally mandated, and in some instances, committees both screen and propose a slate from which a selection is made by either a Governor, a legislature, or both.[9]

Because "their *success* often depends on their *structure*,"[10] screening committees should possess clear criteria for their own membership and for their inquiries into the qualities of candidates.[11] Many committees rely either on constitutional or statutory criteria or have crafted their own metrics to identify candidates who have integrity, generosity of thought, commitments to the well-being of their communities, varied practices and backgrounds, and demographic diversity.[12] Moreover, in many instances, committees have made their processes transparent and make information public through a variety of mechanisms, including by livestreaming proceedings.[13]

Outside the United States, some countries also use screening committees for various levels of their courts, including the Supreme Court. Canada provides one illustration as it utilizes an advisory board made up of stakeholders including government appointees and representatives of the bar, bench, and academia, which offers non-binding recommendations to the prime minister.[14]

Based on experiences of these many screening processes, we recommend the use of screening committees for all lower courts as these judges preside over the bulk of federal litigation.[15] Committees should be composed of individuals with diverse legal, personal, and professional backgrounds. They should be charged with selecting individuals with legal expertise, significant experience as lawyers, an even-keeled approach indicative of judicial temperament, a commitment to public service, and demonstrable adherence to the bar's ethical standards. In reviewing candidates, committees should attend to individuals' backgrounds, experiences, and legal practices to ensure that the judiciary is comprised of people who reflect the diversity of the country and are dedicated to the impartial application of the rule of law.

Further, committees should publicize calls for nominations and build in transparency to make their own decisions accountable.

We also believe it would be wise for the President to consider a screening committee for Supreme Court justices. Moreover, if Supreme Court justices continue to be drawn primarily from the lower federal courts, implementation of a committee-based screening process for lower court judges would also aid in the selection of Supreme Court justices.[16]

2. THE STRUCTURE OF DECISION-MAKING AT THE SUPREME COURT

At present, power on the Supreme Court is highly concentrated. The Court is composed of nine justices, each of whom sits on that specific court for as long as they serve. Under the current system, the justices also have unfettered discretion over the cases they vote to review. All nine justices hear every case as a group unless an individual justice steps aside. Reform is needed to diffuse the concentration of power, and to do so, reforms should consider altering the composition and the decision-making processes of the Court.

Composition of the Court

For many, the Court's size and its method of decision-making are taken for granted. Yet the number is not fixed by the Constitution. Since 1869, the Supreme Court has been a group of nine people, but over the course of U.S. history, the size has varied and the Court has had as few as six justices and as many as 10.[17] Absent a recusal, the full Court hears each case.

In contrast, in federal appellate courts, state appellate courts, and outside the United States, the justices or judges sit in panels of three and, on occasion, sit as a larger group, known as "en banc."[18] For example, the Delaware Supreme Court, which has five members, hears most of its cases in three-justice panels and sits en banc for certain types of cases or when a panel does not reach unanimity.[19] In the United Kingdom, the Supreme Court is comprised of twelve justices, and the court often relies on panels of five and seats larger panels for certain cases.[20]

The fixed, unchanging system of sitting as a whole in the U.S. Supreme Court has helped to bring to the fore the power of individual justices. In today's world, commentators and litigants routinely focus on and predict what each individual justice will decide in an effort to count the "five" that will form a majority. The term "swing" justice captures the idea that when an individual justice is open to moving between the perceived groups of four, that person has an outsized influence on the Court's decision-making. By having a set practice of nine people deciding each case, the stakes of selection are amplified. Now, members of the political branches look to appoint individuals to form a majority on the Court that they believe will repeatedly and consistently shape specific areas of law.[21]

Enlarging the size of the bench or having justices sit in panels for at least some cases could alter this dynamic because it would disrupt static voting blocks.[22] Moreover, justices who seek to shift legal doctrine may come to understand that because they will not be voting on all the cases, they need to persuade other justices about their views, and doing so may moderate efforts to take strident positions.[23]

Were more people and different panels in place, a sense of the fixed views of the set of nine could be diffused. Of course, many issues of implementation would need to be addressed, including the development of ways to minimize inter-panel conflicts and establish criteria for sitting in larger groups or as a whole.[24]

In addition to, or as an alternative to, enlarging the number of seats on the Court and shifting to a panel system, the composition of the Court could shift if some individuals rotated on and off that bench. For example, a pool of judges drawn from the lower federal appellate courts could be formed from which to identify individuals to serve on the Supreme Court for fixed terms and then return to their former position.[25] Such a process, which would make Supreme Court membership time-limited, would provide specified terms and regular turnover and would diffuse the concentration of power held by a small number of justices.

As with our other suggestions, we have drawn the idea of rotating on and off the Court from former and current practices that permit federal judges to sit on a court other than that to which they were appointed. During the early days of the Republic, Supreme Court justices "rode circuit" to serve as temporary judges for lower courts.[26]

In modern times, retired Supreme Court justices can choose to serve on circuit courts.[27] Further, federal law permits the Supreme Court's Chief Justice to assign federal trial and appellate judges to sit at different levels and within different circuits of the federal courts.[28]

Our reference to the authority of the Chief Justice brings us to another issue, which is the breadth of the power held by the individual who occupies that role. The Chief Justice has unique obligations related to the primary business of the Court, such as assigning justices to author opinions when in the majority.[29] Over the decades, the Chief Justice's powers and responsibilities have grown. The Chief Justice functions as the head of the federal judiciary, including chairing the Judicial Conference of the United States, appointing judges to special courts such as the Foreign Intelligence Surveillance Court, selecting members of rulemaking and of other committees, and approving judges who sit by designation on a lower court other than the one to which they are assigned.[30] All told, the Chief Justice has roughly 80 statutorily defined duties in addition to adjudicating cases.[31] None of these duties are mandated by the U.S. Constitution.[32]

The increase in the concentration of power in this role raises concerns that could be mitigated by altering the portfolio of the Chief Justice through limiting the array of duties or by rotating the office from one person to another.[33] Here again, we draw on experiences in other courts. Congress has provided that the chief judges of federal district and circuit courts serve seven-year terms before returning to regular service.[34] On many state supreme courts, chief justices serve set terms and then resume their role as associate justices.[35] In some of these systems, the role is assigned by seniority and in others by the decision of the other sitting justices.

In sum, we believe that adjusting the decision-making structure of the Supreme Court and the role of the Chief Justice could help reduce some of the tensions that accompany the current selection process. In particular, these reforms could reduce the incentives to use the confirmation process to shape a particular agenda for how the Court should rule.

Case Selection

Only during the last century did the Supreme Court gain unfettered discretion to decide which cases it will hear through its decision to grant certiorari ("cert").[36] Under the current practice, four of the nine justices must agree to add a case to the Court's docket. Several justices participate in what is known as a "cert pool," in which their law clerks work together to review the certiorari petitions, of which thousands are filed annually.[37] During the 2018 term, the last full term prior to the COVID-19 pandemic's disruption, the Court heard argument in 73 cases.[38]

Astute litigants and lower court judges know how to bring cases to the attention of four justices, and some of the justices themselves have signaled through opinions or other commentary that they are looking to address certain legal issues.[39] Some may view such commentary as a useful dialogue and conclude that justices are appropriately using their perch to encourage advocates with resources to develop litigation strategies. Others object that justices should not encourage resourced litigants to find cases to fit the mold of the law to which Supreme Court justices aspire.[40] Whether signaling is a problem or not, the power to select cases means the Court can set its own agenda, which has repeatedly raised concerns about what cases are selected for review,[41] as well as broader concerns about the type of power judges should have.[42]

The current system is not inevitable, nor in centuries past was the Court's agenda-setting power so complete. One way to lessen the concentration of power is to obtain input on case selection from judges other than those on the Supreme Court. This would not only alter the power of the justices, but also provide more perspectives and vantage points from those steeped in the sweep of the case law about when the Court's input is needed for clarification and development of legal precepts.

A variety of proposals have been put forth to reallocate some of the decision-making about the docket, and most include having the Supreme Court retain some authority as well.[43] For example, in 2009, a group of commentators proposed that a few experienced circuit court judges be appointed as a "cert panel" to select cases for decision by the Court.[44] Such judges could serve for a fixed number of years and then rotate off, to be replaced by others. The 2009 proposal also created mechanisms for

the Supreme Court to add cases to its own docket. To ensure knowledgeable review of cases coming from state courts, such a panel should also include state supreme court justices, who could be selected by an entity like the Conference of Chief Justices.[45] Other approaches would alter the degree of authority of a cert panel and render its recommendations advisory, or enhance mechanisms like certification from circuit courts to identify cases that require the Supreme Court's attention.[46]

In addition, Congress could delineate more categories of cases for mandatory review by the Supreme Court. Again, history provides examples. Until 1925, when Congress gave the Court discretion over a large share of its caseload, mandatory cases were a common element of the Supreme Court docket. Congress further increased the Court's discretion over the following six decades.[47] Currently, Congress requires the Supreme Court to hear cases that arise from three-judge district courts, which are themselves now only required for a small subset of cases.[48]

These statutes provide examples of congressional choices to send some cases directly to the Supreme Court. Our general point is that as a matter of history, the Supreme Court did not have unfettered control over its docket, and many routes are available to achieve a reallocation of power.

3. LENGTH OF JUDICIAL SERVICE

Supreme Court justices serve as long as they choose, absent illness, death, or impeachment. While the actual amount of time that federal judges spend on the bench has varied over the course of the country's history, it is now common for justices to spend two to three decades on the bench.[49] The concentration of the significant power of the justices for so long raises concerns, both because few people hold this office and because it limits opportunities for others to contribute to the adjudicatory process. We endorse limits on Supreme Court tenure because more turnover could bolster the Court's relationship to democratic legitimacy and, by expanding the number of people selected at regular intervals, reduce some of the pressures on the selection process.

The Constitution rightly shelters federal judges from political interference by protecting their tenures during their good behavior and their salaries during their

term of office.[50] But the Constitution does not define "good behavior," and while it is commonly interpreted to denote holding office for life, it is not necessarily tethered to holding a particular position within the federal judiciary for that term of service.[51] Many Constitutions protect the independence of judges, but often rely on fixed terms of office, mandatory retirement, or other ways to limit the length of service. Thus, as currently interpreted, Article III's life tenure provision is unusual when contrasted with most state judiciaries and other constitutional democracies.[52] For example, the Constitution of the Commonwealth of Massachusetts, which predates the U.S. Constitution, also grants judges tenure "during good behavior." In 1972, Massachusetts amended its Constitution to define the term of judicial tenure as good behavior until mandatory retirement at age 70.[53]

Several options are available to alter the pattern, and many proposals have been put forth. One approach is to create an 18-year non-renewable term on the Supreme Court, followed by a transition to senior status or to active service on lower Article III courts.[54] Again, current practice provides a model. For justices who wish to serve on lower courts after their retirement from the Supreme Court, a statute outlines the procedure to do so; Justices Sandra Day O'Connor and David Souter provide recent examples of its use.[55] If the number of justices on the Court remained at nine or if that number is increased, a fixed, 18-year term would result in an open Supreme Court seat at least every other year and thereby create the opportunity for a president to nominate at least two justices each presidential term.[56]

Alternatively, a mandatory retirement age could be implemented.[57] A number of constitutional democracies and several U.S. states have mandatory retirement ages, typically at age 70 or 75.[58] The idea of linking service to age is commonplace in many other professions and aims to ensure that people have the stamina and capacity to do the required work. To address concerns about disability while in office, a 1980 statute creates a mechanism to identify such problems within the lower federal courts, but it does not create additional support to judges who retire after developing a disability.[59]

A retirement age, like a fixed term, creates some predictability about the duration of individuals' service, even though individuals could leave before they reach retirement age. Because a retirement age requirement could create incentives to select younger appointees, such a reform would need to be coupled with other suggestions—such as

the use of panels—to diffuse the power held by any single justice during their term of service.

Another route—again, commonplace in other working environments—is to create incentives for a justice to retire or move on.[60] Many judges have indicated that a desire for public service is a key factor motivating them to take senior status rather than leaving the bench altogether.[61] Therefore, while incentives are often financial, in addition to enhanced pension benefits for people choosing such options, both the courts and Congress could provide opportunities for retired justices to serve government in other roles.[62] To the extent financial incentives are used, they would need to be calibrated to avoid disproportionately incentivizing judges with fewer means to step away from the bench earlier than their wealthier peers.

Overall, limits on judicial service could align the Court with democratic practices that seek to preserve the legitimacy of an independent judiciary through, in part, avoiding lifetime appointments. Such limits could also de-escalate the current tensions associated with that current selection process.

4. CONDUCT OF THE COURT: CLEAR ETHICAL OBLIGATIONS, TRANSPARENT DECISION-MAKING, AND ACCESS TO THE COURT'S PUBLIC PROCEEDINGS

Given the centrality of the Supreme Court, and its current state as untethered to the ethical and procedural obligations imposed on other courts, reform of its approach to ethics and recusal and to the accessibility and transparency of its decision-making is needed.

Ethical Obligations

Justices of the Supreme Court are not bound by codes of conduct that apply to lower federal court and to state court judges.[63] Those codes address issues of partiality, prohibit participation in fundraising activities, and guide judges as they decide what roles to take in the public sphere. The justices may seek guidance from the United States Code of Conduct, yet they are not compelled to comply with it, nor does the Code address special circumstances that may face Supreme Court justices.[64]

Federal statutes also provide limited guidance on when a justice should step aside from a case. Federal law mandates that judges and Supreme Court justices recuse themselves in any case where their "impartiality might reasonably be questioned," as well as under specified circumstances, such as if they have financial interests in a specific case.[65] In some state courts, rules provide that a judge other than the one whose impartiality is questioned decide the question of recusal.[66] Litigants can also appeal a judge's refusal to recuse. In contrast, Supreme Court justices' decisions about their potential conflicts are made by each individual justice, and no mechanism exists for review of their personal judgments about whether to step aside.

Creating clearer ethical obligations and guidance for Supreme Court justices and mechanisms to have more than the individual justice decide issues of impartiality would bring the institution in line with the rest of our government and end the practice of justices being "judges in their own case."[67] One way to do so would be to end the self-governance practices of the Court and replace them with a binding code of conduct. In terms of when to step aside, to be effective that code would need to address recusal determinations. One option would be to require that all justices determine recusal.[68] Some state supreme courts take this approach, typically by referring a recusal motion to the full court or authorizing a party to appeal a justice's refusal to recuse to the full court.[69] Another option is to ask a panel of circuit judges to advise on requests for recusal.

Further, the code needs to address the justices' presumption against recusal. Under the current practice of a nine-person bench, the justices' concerns about an evenly split decision have been used to explain as weighing against recusal.[70] Were more justices on the bench, or panels in place, or appellate judges rotating on and off, those concerns would be assuaged. Moreover, the experience of having a Court of eight people for many months has demonstrated that four-four split decisions, which leave a lower court decision in place, will not necessarily result from an even-numbered group of justices rendering judgments.[71] Some of the justices also indicated that a sense of the need to avoid deadlock prompted more conciliatory or more modest decisions.[72] Scholars have found that Supreme Court recusals do not often produce equally divided rulings.[73] This history makes plain that enforcement of norms to step aside is the wiser course.[74]

The code also needs to address the conduct of the justices when they are off the bench. The justice's appearance before organizations that are perceived to be partisan affects public perceptions of judicial impartiality. To avoid the specter of bias, the Code should advise justices to avoid participating in organizations, whether or not traditional political associations, that cast doubt on the justice's impartiality.[75]

The system for discovering and appropriately responding to financial conflicts of interest also needs to be improved, which would, in turn, improve decision-making about recusal. The justices, like all judges, are required by statute to file financial disclosures.[76] Yet examples exist of judges at all levels of the judiciary sitting on cases in which evidence of a conflict later emerges. One way to avoid a conflict is to require justices and judges to divest individual stock ownership or to place their assets in a blind trust.[77] Practices from the executive branch may provide an example. In recent decades, most presidents, from both parties, have placed their assets in blind trusts or held non conflicting assets like diversified mutual funds, and it is common for incoming executive branch officials to divest assets that would present conflicts.[78]

Accessible and Transparent Decision-Making

"Publicity is the very soul of justice,"[79] and our Constitution and common law have shaped a jurisprudence in which the public has access to all criminal and civil judicial proceedings.[80] Thus, another important facet of judging is communication with the public.[81]

The Supreme Court's practice of publishing opinions and orders reflects this commitment. Yet, during the past several years, the Court has entered a significant number of cases without full briefing and oral argument. Instead, in what some call a "shadow docket," the Court has ruled on motions, granted stays, issued unsigned decisions, and taken up cases that have not reached a final decision in the lower court,[82] including in death penalty cases under execution warrant.[83] Likewise, when justices do recuse themselves, they do not regularly explain why.[84]

Furthermore, unlike all the other courts, where rulemaking is a public process with time for notice and comment, the Supreme Court makes its own rules without relying on that process.[85] Lower courts rely on the Rules Enabling Act procedures to gain

input from lawyers and litigants about the rules proposed to be altered, but the Supreme Court does not have the benefit of such input unless it does so on an ad hoc basis.

We need the disciplined development of precedent to guide future decisions, as well as disciplined procedure to produce that law. Adhering to the process of full briefing and arguments and publication is an important facet of this obligation, and the departure from these practices is worrisome.[86] We recommend that the Court move away from its ad hoc procedure, explain the reasons for its dispositions, and regularize its rulemaking processes by adopting the procedures that it currently oversees for the lower courts.

Public Access to the Court's Proceedings

The Supreme Court's commitment to being accessible is part of its responsible use of power. Accordingly, the public should be able to hear and see the oral arguments of the Supreme Court. An important first step was prompted by the COVID-19 crisis, when the Court relied on telephonic oral arguments and, for the first time in its history, allowed live remote access to the audio of those proceedings.[87] The significant public interest in the audio broadcasts of the Court's telephonic arguments confirms that the time has come for regular live video and audio access to the Court's proceedings.[88]

Here, as elsewhere in this report, examples from other jurisdictions are plentiful. Broadcast proceedings through closed systems have become commonplace in many state and federal courts, as well as in courts outside the United States.[89] The literature on this issue is vast, and here we join with many others in calling for ready access—no matter where people live—to see and hear the public proceedings of the U.S. Supreme Court.[90]

A Closing Comment on These Interactive Reforms

We have outlined a packet of interrelated reforms because the various components need to work together to respond to the problems of this era. These proposals address troubling facets of the current system—from selection and nomination through the practices of decision-making and judicial tenure to ethics and

transparency. If these reforms were put into place, they could work in tandem, complement one another, and create more robust and effective change than would any single proposal, standing alone.

We provide just brief illustrations. Consider, for example, recusal. Currently, Supreme Court justices weigh the "duty to sit" against the potential of an actual or perceived conflict of interest—frequently erring on the side of hearing a case for which objective considerations would counsel recusal. But, if enforced recusal rules were coupled with a system in which the composition of the Court is drawn from various circuit court judges, another (circuit) judge would be available to hear the case. Similarly, if the membership of the Court is increased or panels used, the recusal of one justice would not necessarily mean an even number of justices would hear a case. In short, with more people in play, there would be more dynamism in decision-making on the Court, the power concentrated in any single person on the Court would be diffused, *and* the justices would be better situated to decide to disqualify themselves when appropriate.

Similarly, a limit of service on the Supreme Court necessarily creates more opportunities for appointments to the Court. On its own, one might anticipate more conflicts over confirmation, but combined with the use of screening committees and compositional changes that deemphasize individual justices, the whole package of such reforms can help alter the stakes by lowering the impact of each individual selected.

In closing, we have learned a great deal through being in conversation with each other and reaching out to many other experts during the course of the many months of this project. Moreover, as is evident, we are indebted to many scholars, advocates, and policymakers who have thought about these issues in prior and current times and put forth proposals. Rather than debate each suggestion one by one, we have sought to chart a path forward by focusing on how to lower the stakes of each judicial selection. To do so requires, in our view, addressing how judicial candidates are identified and selected, the structure of decision-making on the Court, the duration of service, and the conduct of the Court itself. While there are many ways to respond, addressing *each* and *all* of these key areas is vital to ensuring the vitality and legitimacy of the federal courts.

Our hope is that, by focusing on how to alter the incentives that make judicial selection such a high stakes proposition, these proposals will assist justices in carrying out their important obligations and in staying above the political fray.

Endnotes

[1] U.S. Const., Art. III.

[2] Our framing of an interactive package of reforms echoes the point made by Professor Vicki C. Jackson on the interrelatedness and interdependencies of judicial design. *See* Vicki C. Jackson, "Packages of Judicial Independence: Implications for Reform Proposals on the Selection and Tenure of Article III Judges," *Daedalus*, vol. 137, no. 4 (2008): 48, https://direct.mit.edu/daed/article/137/4/48/26770/Packages-of-judicial-independence-implications-for.

[3] The committee was made up of panels for each appellate circuit. Exec. Order No. 11972 (February 14, 1977); Exec. Order No. 12097 (November 8, 1978); The Governance Institute, the Institute for the Advancement of the American Legal System, and the Brookings Institution, *Options for Federal Judicial Screening Committees: Where They Are in Place, How They Operate, and What to Consider in Establishing and Managing Them* (2011), I,' https://www.brookings.edu/wp-content/uploads/2016/06/0913_judicial_screening.pdf.

The Carter committee, together with the 1978 bill that expanded the federal judiciary by 152 seats (33 percent), transformed the demographic makeup of the judiciary. Mary Clark, "Carter's Groundbreaking Appointment of Women to the Federal Bench: His Other 'Human Rights' Record," *American University Journal of Gender, Social Policy & the Law*, vol. 11, no. 3 (2003): 3, https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1323&context=jgspl; Mark Joseph Stern, "Carter's Quiet Revolution," *Slate*, July 14, 2019,https://slate.com/news-and-politics/2019/07/jimmy-carter-diversity-judges-donald-trump-court-nominees.html; Renee Knake Jefferson and Hannah Brenner Johnson, *Shortlisted: Women in the Shadows of the Supreme Court* (New York: NYU Press, 2020), 201.

[4] By tradition, senators recommend candidates for judicial office within their states to the president. Senators most commonly use committees for district court nominees, though some screen circuit court nominees as well. The committees vary widely in scope, composition, and operation, with several failing to ensure diversity of membership and transparency. The Governance Institute, the Institute for the Advancement of the American Legal System, the Brookings Institution, *Options for Federal Judicial Screening Committees: Where They Are in Place, How They Operate, and What to Consider in Establishing and Managing Them* (2011), 29-36, https://www.brookings.edu/wp-content/uploads/2016/06/0913_judicial_screening.pdf.

[5] 28 U.S.C. §152(a).

[6] 28 U.S.C. §631(a).

[7] The judicial councils (made up of circuit and district judges) of each circuit are responsible for identifying candidates for bankruptcy judgeships. 28 U.S.C § 152 note ("Appointment to Fill Vacancies; Nominations; Qualifications"). Judicial Conference regulations allow each judicial council to appoint a

merit panel to screen and recommend candidates to the council. Judicial Conference of the United States, Regulations for the Selection, Appointment, and Reappointment of United States Bankruptcy Judges §§ 3.01-4.01 (2006) ("Establishment of Panel; Membership; Duties; Panel Report; Alternative to Panel; Selection of Nominees"). A bankruptcy judge is appointed from the council's list by a majority of the judges serving on the circuit court, or by the chief judge of the circuit if no candidate gets majority support. 28 U.S.C. §128(a)(1).

As of 2013, eleven circuits used merit panels for the screening of bankruptcy judicial candidates. Malia Reddick and Natalie Knowlton, Institute for the Advancement of the American Legal System, *A Credit to The Courts: The Selection, Appointment, and Reappointment Process for Bankruptcy Judges* (April 2013), 10.
https://iaals.du.edu/sites/default/files/documents/publications/a_credit_to_the_courts.pdf.

Federal law also establishes basic qualifications for bankruptcy judges, including bar membership in good standing; good character; sound health; commitment to equal justice; demonstrated legal ability; and judicial temperament. 28 U.S.C. § 152 note.

Federal law requires the use of merit panels in the selection of magistrate judges. 28 U.S.C. §631(b)(5). These panels must consist of at least seven members of the public from the jurisdiction, at least two of whom should not be lawyers. Judicial Conference of the United States, Regulations Establishing Standards for the Appointment and Reappointment of Magistrate Judges § 3.02 (2001). In each district, the active judges select a candidate to become a magistrate judge from the list of candidates the panel recommends. If no candidate has majority support, the district's chief judge is to decide. 28 U.S.C. §631(a); Judicial Conference of the United States, Regulations Establishing Standards for the Appointment and Reappointment of Magistrate Judges § 4.01. *See also* Tracey E. George and Albert H. Yoon, "Article I Judges in an Article III World: The Career Path Of Magistrate Judges, *Nevada Law Journal*, vol. 16 (2016): 831.
https://scholars.law.unlv.edu/cgi/viewcontent.cgi?article=1678&context=nlj.

As with bankruptcy judges, there are qualification requirements for magistrate judges. These include bar membership in good standing for at least five years, competency, and having no familial relationship with a judge on the appointing court. 28 U.S.C. § 631(b). Judicial Conference regulations additionally require five years of active legal practice, good moral character, emotional stability and maturity, commitment to equal justice, good health, patience, courteousness, ability to deliberate and decide, and a maximum age of sixty-nine on initial appointment. Judicial Conference of the United States, Regulations Establishing Standards for the Appointment and Reappointment of Magistrate Judges § 1.01 (2001).

Some of the history of the creation of these statutory judgeships and the case law addressing their constitutionality is provided in an essay, written for the 200th anniversary of the D.C. District Court. *See* Judith Resnik, "'Uncle Sam Modernizes His Justice:' Inventing the Federal District Courts of the Twentieth Century for the District of Columbia and the Nation," *Georgetown Law Journal*, vol. 90 (2001-2002): 629-643, 669-674,
https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1769&context=fss_papers.

[8] *See* Rachel Paine Caufield, American Judicature Society, *Inside Merit Selection: A National Survey of Judicial Nominating Commissioners*, (2012), 63-66,
http://www.judicialselection.com/uploads/documents/JNC_Survey_ReportFINAL3_92E04A2F04E65.pd

f; Brennan Center for Justice, "Judicial Selection: Significant Figures," May 8, 2015, https://www.brennancenter.org/our-work/research-reports/judicial-selection-significant-figures; American Judicature Society, *Merit Selection: The Best Way to Choose the Best Judges* (October 2009), 1, http://www.judicialselection.us/uploads/documents/ms_descrip_1185462202120.pdf; National Center for State Courts, "Methods of Judicial Selection," http://www.judicialselection.us/judicial_selection/methods/judicial_nominating_commissions.cfm.

[9] South Carolina is currently the only state in which a screening commission nominates judicial candidates and state legislators—not governors or the public—choose judges. *See* S.C. Const. Art. V, § 27. *See generally* Jed Handelsman Shugerman, *The People's Courts* (Cambridge, MA: Harvard University Press, 2012).

For examples of states with constitutional and statutory requirements, *see* Ariz. Const., Art. 6, §§ 36, 37, and 41; N.Y. Const. Art. VI § 2(e) ("The governor shall appoint, with the advice and consent of the senate, from among those recommended by the judicial nominating commission..."); Conn. Gen. Stat. § 51-44a. ("There is established a Judicial Selection Commission ... .The commission shall evaluate incumbent judges who seek reappointment to the same court and shall forward to the Governor for consideration the names of incumbent judges who are recommended for reappointment as provided in this subsection."); Idaho Code Title 1, Ch. 21 ("There is hereby created a judicial council ...The judicial council shall: ... Submit to the governor the names of not less than two (2) nor more than four (4) qualified persons for each vacancy in the office of justice of the supreme court, judge of the court of appeals, or district judge").

In some other states, commissions are established by executive order. *See, e.g.*, Del. Exec. Order No. 4 ("The Judicial Nominating Commission is continued to assist the Governor regarding all appointments of judges ..."); Ga. Exec. Order, February 7, 2019 ("[T]here is created the Judicial Nominating Commission for the State of Georgia. The Commission shall make nominations to fill vacancies on all courts of record in the State."); Mass. Exec. Order No. 558 ("A Judicial Nominating Commission ('Commission') is hereby established to identify and invite application by persons qualified for judicial office and to advise the Governor with respect to appointments of justices to the Appeals Court and Trial Court departments").

[10] Alicia Bannon, Brennan Center for Justice, *Choosing State Judges: A Plan for Reform* (2018), 6. https://www.brennancenter.org/sites/default/files/2019-08/Report_Choosing_State_Judges_2018.pdf.

[11] For example, in Connecticut, the screening committee must include both lawyers and non-lawyers Conn. Gen. Stat. § 51-44a.

See also Rachel Paine Caulfield, "What Makes Merit Selection Different?," *Roger Williams University Law Review*, vol. 15, 765 (2010): n.7, https://docs.rwu.edu/cgi/viewcontent.cgi?article=1441&context=rwu_LR; Charles Geyh, "Methods of Judicial Selection and Their Impact on Judicial Independence," *Daedalus* (2008): 98, https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1053&context=facpub; G. Allen Tarr, "Designing an Appointive System: The Key Issues," *Fordham Urban Law Journal*, vol. 34, no. 1 (2007): 301-303, https://ir.lawnet.fordham.edu/ulj/vol34/iss1/16/; Malia Reddick and Rebecca Love Kourlis, Institute for the Advancement of the American Legal System, *Choosing Judges: Judicial*

Nominating Commissions and the Selection of Supreme Court Justices (2014), 6-7, https://iaals.du.edu/sites/default/files/documents/publications/choosing_judges_jnc_report.pdf.

[12] For example, Minnesota and Rhode Island laws sets forth several criteria that seek to diversify the judiciary. Minn. Stat. 480B.01 ("A Commission on Judicial Selection is established. ... The commission shall actively seek out and encourage qualified individuals, including women and minorities, to apply for judicial offices."); 545-10 R.I. Code. R. § 1.1(A) ("...said Commission shall actively seek out and encourage applications who will reflect the diversity of the community they will serve"), and (B) ("The Commission shall advertise for the filling of judicial vacancies in newspapers ... including minority publications .... Said advertisement shall encourage racial, ethnic, and gender diversity within the judiciary").

With respect to consideration of the political affiliation of judicial candidates, the U.S. Supreme Court recently examined a provision in Delaware's Constitution that stipulates that no more than three of the five members of the state supreme court can "be of the same major political party, and two of said Justices shall be of the other major political party." The Court dismissed the case on standing grounds without addressing the requirement. However, Justice Sotomayor wrote separately to note that limiting government service to members of certain parties raised constitutional concerns. Carney v. Adams, 141 S. Ct. 493, 503 (2020).

[13] For example, the Arizona constitution requires its judicial selection commission to hold public hearings and review public testimony. Ariz. Const. Art. VI, § 36(D); Arizona Commission on Appellate Court Appointments, Nominating Committee, "Meeting Agendas and Minutes," https://bc.azgovernor.gov/bc/commission-appellate-court-appointments. The committee's May 27, 2020 meeting was held by phone and the public was permitted to join. *See also* Alicia Bannon, Brennan Center for Justice, *Choosing State Judges: A Plan for Reform* (2018), 7-9, https://www.brennancenter.org/sites/default/files/2019-08/Report_Choosing_State_Judges_2018.pdf.

[14] Order in Council PC 2016-0693; Office of the Commissioner for Federal Judicial Affairs Canada, "The Independent Advisory Board for Supreme Court of Canada Judicial Appointments," https://fja-cmf.gc.ca/scc-csc/2021/establishment-creation-eng.html; Office of the Commissioner for Federal Judicial Affairs Canada, "Guide for Candidates," https://www.fja.gc.ca/appointments-nominations/guideCandidates-eng.html#Judicial.

Canadian law does not require the use of committees; recent prime ministers have established them as a matter of custom, though the details of the processes, especially the degree of transparency they provide, have varied between governments. *See generally* Jacob Ziegel, "A New Era in the Selection of Supreme Court Judges?," *Osgoode Hall Law Journal*, vol. 44, no. 3 (Fall 2006), https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1286&context=ohlj.

The Canadian system has been criticized for failing to achieve a diverse bench. Brennan Center for Justice, "Diversity on the Bench: Not Just an American Problem," March 25, 2017, https://www.brennancenter.org/our-work/analysis-opinion/diversity-bench-not-just-american-problem.

The United Kingdom, in a process mandated by law, selects members of the Supreme Court based on the input of a panel made up of the president of the Supreme Court, another senior judge, and the leaders of the judicial selection panels for England and Wales, Scotland, and Northern Ireland. The panel issues recommendations to the lord chancellor, who in turn makes a final recommendation to the prime minister. Constitutional Reform Act 2005, c. 4, §§26-27B. The jurisdictions that make up the UK also use committees. Judiciary and Courts (Scotland) Act 2008, c. 13, §§ 9-18; Justice (Northern Ireland) Act 2002, c. 26 § 3; Judicial Appointments Commission Regulations 2013, SI 2013/2191 (Eng.). *See generally* Judith Maute, "English Reforms to Judicial Selection: Comparative Lessons for American States?," *Fordham Urban Law Journal*, vol. 34, no. 1 (2007), https://ir.lawnet.fordham.edu/ulj/vol34/iss1/13/.

For essays on judicial selection methods from a variety of countries, *see* Kate Malleson and Peter Russell, eds., *Appointing Judges in an Age of Judicial Power: Critical Perspectives from around the World* (Toronto: University of Toronto Press, 2006). *See also* Jan van Zyl Smit, Bingham Centre for the Rule of Law, *The Appointment, Tenure, and Removal of Judges under Commonwealth Principles: A Compendium and Analysis* (2015), https://binghamcentre.biicl.org/documents/38_van_zyl_smit_2015_commonwealth_compendium.pdf.

[15] In the 12-month period ending September 30, 2020, there were about 73,000 criminal and 267,000 civil filings in federal district courts (not including an anomalously large multidistrict lawsuit over earplug product liability); about 48,000 appeals filed in circuit courts; and about 5,500 cases filed in the Supreme Court, with 73 argued. Chief Justice John Roberts, *2020 Year-End Report on the Federal Judiciary* (December 31, 2020), 5-6, https://www.supremecourt.gov/publicinfo/year-end/2020year-endreport.pdf.

[16] Susan Navarro Smelcer, Congressional Research Service, "Supreme Court Justices: Demographic Characteristics, Professional Experience, and Legal Education, 1789-2010," R40802 (April 9, 2010), 15; Kristen Bialak, "What backgrounds do U.S. Supreme Court justices have?," Pew Research Center, March 20, 2017, https://www.pewresearch.org/fact-tank/2017/03/20/what-backgrounds-do-u-s-supreme-court-justices-have/.

[17] *See* Peter Fish, "Justices, Number of," in *The Oxford Companion to the Supreme Court of the United States*, ed. Kermit Hall, 2nd ed. (Oxford University Press, 2005), 550.

[18] Federal Rule of Appellate Procedure 35 governs en banc review generally ("[a] majority of the circuit judges who are in regular active service and who are not disqualified may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc"). The specific procedures vary according to the local rules in each circuit. *See generally* Alexandra Sadinsky, "Redefining En Banc Review in the Federal Courts of Appeals," *Fordham Law Review*, vol. 82, no. 4 (2014): 2001, http://fordhamlawreview.org/wp-content/uploads/assets/pdfs/Vol_82/Sadinsky_March.pdf.

FRAP 35 generally precludes judges who have taken senior status from participating in en banc proceedings, although 28 U.S.C. § 46(c) provides that "any senior circuit judge of the circuit shall be eligible … to participate … as a member of an in banc court reviewing a decision of a panel of which such judge was a member."

[19] Delaware Supreme Court Rule 4; *see also* Tracey E. George & Chris Guthrie, "Remaking the United States Supreme Court in the Courts' of Appeals Image," *Duke Law Journal*, vol. 58, no. 7 (2009): 1461, https://scholarship.law.duke.edu/dlj/vol58/iss7/7.

[20] UK law provides that "The Supreme Court is duly constituted in any proceedings only if all of the following conditions are met—a) the Court consists of an uneven number of judges; b) the Court consists of at least three judges." Constitutional Reform Act 2005, c. 4, § 42(1); U.K. Supreme Court, *Annual Report and Accounts, 2019-2020* (September 17, 2020), 65, https://www.supremecourt.uk/docs/annual-report-2019-20.pdf.

[21] As professors Jack Balkin and Sanford Levinson have commented, "by installing enough judges and Justices with roughly similar ideological views over time, Presidents can push constitutional doctrine in directions they prefer … partly for this reason the Supreme Court tends, in the long run, to cooperate with the dominate political forces of the day." Jack Balkin and Sanford Levinson, "The Process of Constitutional Change: From Partisan Entrenchment to the National Surveillance State," *Fordham Law Review*, vol. 75, no. 2 (2006-2007): 490, https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=4194&context=flr.

[22] Others have suggested such a reconfiguration. Tracey E. George and Chris Guthrie, "Remaking the United States Supreme Court in the Courts of Appeals' Image," (see note 19); Tracey E. George and Chris Guthrie, "'The Threes': Re-Imagining Supreme Court Decisionmaking," *Vanderbilt Law Review*, vol. 61, no. 6 (2008): 1825-1860, https://scholarship.law.vanderbilt.edu/vlr/vol61/iss6/4/; H.R. 865, 47th Cong. (1st Sess. 1881); "Minority Report on the Relief of the United States Courts," *Annual Report of the American Bar Association*, vol. 5 (1883): 368.

[23] Scholars note that judicial decisionmaking in groups has fundamentally different dynamics than individual judging. Lewis Kornhauser and Lawrence Sager, "The One and the Many: Adjudication in Collegial Courts," *California Law Review*, vol. 81, no. 1 (1993): 6-10, https://lawcat.berkeley.edu/record/1114609. In addition, the dynamics of group decisionmaking vary based on the size of the group, with smaller groups tending to cooperate better. George and Guthrie, "Remaking the United States Supreme Court in the Courts of Appeals' Image," 1472-1474(see note 19). This has led some panel proponents to suggest that three-justice panels may be more likely to find common ground to avoid dissents. George and Guthrie, "'The Threes': Re-Imagining Supreme Court Decisionmaking," 1837 (see note 22).

[24] Some experts have expressed concern that panels would not fundamentally alter the dynamics of decision making on the Court if significant cases were heard en banc. Russel Wheeler, "Should We Restructure the Supreme Court?," The Brookings Institution, March 2, 2020, https://www.brookings.edu/policy2020/votervital/should-we-restructure-the-supreme-court/; Daniel Epps and Ganesh Sitaraman, "How to Save the Supreme Court," *Yale Law Journal*, vol. 129 (2019): 175, https://www.yalelawjournal.org/feature/how-to-save-the-supreme-court.

Others have argued that it would be problematic for the full Court not to hear significant cases. *See, e.g., Reorganization of the Judiciary: Hearings on S. 1392 Before the Senate Judiciary Committee*, 75th Congress, 1st Sess. (1937), pt. 3, 491 (letter of Chief Justice Charles Evans Hughes).

The manner in which panels are selected requires careful attention, as research on panel systems abroad suggests that when given the discretion to appoint panels, chief justices may do so based on their expectations of how judges will decide cases. Lori Hausegger and Stacia Haynie, "Judicial Decisionmaking and the Use of Panels in the Canadian Supreme Court and the South African Appellate Division," *Law & Society Review*, vol 37, no. 3 (2003): 655.

[25] John O. McGinnis, "Justice Without Justices," *Constitutional Commentary*, vol. 16 (1999), 541, https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1541&context=concomm; Epps and Sitaraman, "How to Save the Supreme Court," 181, (see note 24).

[26] Judiciary Act of 1789, 1 Stat. 73, § 4 (1789); Judiciary Act of 1802, 2 Stat. 73, § 4 (1802). Congress reduced the circuit riding requirement to one term every two years in 1869, Judiciary Act of 1869, 16 Stat. 44, § 4, and eliminated it in 1891. Judiciary Act of 1891, 26 Stat. 826 (1891).

[27] 28 U.S.C. § 294.

[28] 28 U.S.C. §§ 291-292.

[29] The extent to which these powers allow the Chief Justice to exert influence over the other justices and the business of the court, and the mechanisms by which that influence is exercised, has been the subject of debate among scholars. *See, e.g.*, David J. Danelski, "The Influence of the Chief Justice in the Decisional Process of the Supreme Court," in *American Court Systems*, ed. Sheldon Goldman and Austin Sarat(San Francisco: W.H. Freeman, 1978), 506-519; Frank Cross and Stefanie Lindquist, "The Decisional Significance of the Chief Justice," *University of Pennsylvania Law Review* vol 154, no. 6 (2006): 1665-1707, https://scholarship.law.upenn.edu/penn_law_review/vol154/iss6/9/; G. Edward White, "The Internal Powers of the Chief Executive: The Nineteenth-Century Legacy," *University of Pennsylvania Law Review* vol 154, no. 6 (2006): 1463-1510, https://www.law.upenn.edu/journals/lawreview/articles/volume154/issue6/White154U.Pa.L.Rev.1463%282006%29.pdf; Joel Goldstein, "Leading the Court: Studies in Influence as Chief Justice," *Stetson Law Review*, vol. 40, no. 3 (2011): 717-761, https://www.stetson.edu/law/lawreview/media/40-3-Goldstein-PublicationCopy.pdf; Alan Morrison, "Opting for Change in Supreme Court Selection, and for the Chief Justice, Too," in *Reforming the Court: Term Limits for Supreme Court Justices*, ed. Roger Cramton and Paul Carrington, (Durham: Carolina Academic Press, 2006), 203-224.

[30] 28 U.S.C. § 331 ("He shall preside at such conference which shall be known as the Judicial Conference of the United States;" "If the Conference elects to establish a standing committee, it shall be appointed by the Chief Justice"); 50 U.S.C. §1803(a)(1) ("the Chief Justice of the United States shall publicly designate 11 district court judges" to serve on the Foreign Intelligence Surveillance Court); 28 U.S.C. § 601 (Administrative Office of the United States Courts is led by a director and deputy director "appointed and subject to removal by the Chief Justice of the United States, after consulting with the Judicial Conference"); 28 U.S.C. §§ 291-292.

Research suggests that Chief Justices have used their appointment powers to place ideologically aligned judges on influential panels. *See e.g.* Dawn Chutkow, "The Chief Justice as Executive: Judicial Conference Committee Appointments," *Journal of Law and Courts*, vol. 2, no. 2 (2014): 302, 313, https://www.journals.uchicago.edu/doi/10.1086/677172; David Nixon, "Policy-Making by a Different

Means: The Chief Justice's Attempts to Shape Policy through the Judicial Conference of the United States," *Rationality and Society*, vol. 15, no. 3 (2003): 356.

[31] "Appendix B: Statutory Duties of the Chief Justice of the United States," *in* Judith Resnik and Lane Dilg, "Responding to a Democratic Deficit: Limiting the Powers and the Term of the United States Chief Justice," *University of Pennsylvania Law Review* vol. 154, no. 611575 (2006): 1652-1657, https://digitalcommons.law.yale.edu/fss_papers/697/; *see also* Alan Morrison and Scott Stenhouse, "The Chief Justice of the United States: More Than Just the Highest Ranking Judge," *Constitutional Commentary*, vol. 1 (1984): 57-79, https://scholarship.law.umn.edu/concomm/46/.

[32] The Chief Justice has one constitutionally mandated duty, which is to preside over impeachment trials of presidents. U.S. Const. Art. I, § 3.

[33] Resnik and Dilg, "Responding to a Democratic Deficit: Limiting the Powers and the Term of the United States Chief Justice," 1644-1649 (see note 31); Theodore W. Ruger, "The Judicial Appointment Power of the Chief Justice," *University of Pennsylvania Law Review,* vol. 7, no. 2 (2004): 387-389, https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1303&context=jcl; Theodore W. Ruger, "The Chief Justice's Special Authority and the Norms of Judicial Power," *University of Pennsylvania Law Review* vol 154, no. 6 (2006): 1570-1573

https://www.law.upenn.edu/journals/lawreview/articles/volume154/issue6/Ruger154U.Pa.L.Rev.1551%282006%29.pdf; Edward Swaine, "Hail, No: Changing the Chief Justice," *University of Pennsylvania Law Review*, vol. 154, no. 6, 1709 (2006): 1720-1724. https://www.law.upenn.edu/journals/lawreview/articles/volume154/issue6/Swaine154U.Pa.L.Rev.1709%282006%29.pdf.

[34] 28 U.S.C. §§ 45, 136.

[35] "Appendix C: Tenure and Methods of Selection of State Chief Justices," in Resnik and Dilg, "Responding to a Democratic Deficit: Limiting the Powers and the Term of the United States Chief Justice," 1658-1664 (see note 31).

[36] Congress granted the Court discretion over a large portion of its docket in the 1925 Judges' Bill, which allowed the Court to hear most cases by writ of certiorari. Judiciary Act of 1925, Pub. L. 68-415, 43 Stat. 936 (1925). By 1988, Congress had repealed nearly all the provisions that called for mandatory review of certain types of cases. Supreme Court Case Selections Act, Pub. L. 100-352, 102 Stat. 662 (1988). *See generally* Edward Hartnett, "Questioning Certiorari: Some Reflections Seventy-Five Years after the Judges' Bill," *Columbia Law Review*, vol. 100, no. 7 (2000); *see also* Jonathan Sternberg, "Deciding Not to Decide: the Judiciary Act of 1925 and the Discretionary Court," *Journal of Supreme Court History*, vol. 31, no. 1 (2012): 5, https://www.martindale.com/matter/asr-1628380.pdf.

[37] *See* Michael Sturley, "Cert Pool," in *The Oxford Companion to the Supreme Court of the United States*, 155-6 (see note 17). There were 6,442 cases filed in the Supreme Court in the 2018 term. Chief Justice John Roberts, *2019 Year-End Report on the Federal Judiciary*,5 (see note 15).

[38] In the 2004 term, it heard 87 cases, and in 1984, it heard 175 cases. Chief Justice John Roberts, *2019 Year-End Report on the Federal Judiciary*, 5 (see note 15).

[39] *See* Vanessa Baird and Tonja Jacobi, "Judicial Agenda Setting Through Signaling and Strategic Litigant Responses," *Washington University Journal of Law and Policy*, vol. 29, no. 1 (2009): 238, https://openscholarship.wustl.edu/law_journal_law_policy/vol29/iss1/8.

[40] Linda Greenhouse, "Bring Me a Case," *New York Times*, November 13, 2013, https://www.nytimes.com/2013/11/14/opinion/bring-me-a-case.html; Adam Liptak, "With Subtle Signals, Supreme Court Justices Request the Cases They Want to Hear," *New York Times*, July 6, 2015, https://www.nytimes.com/2015/07/07/us/supreme-court-sends-signals-to-request-cases-they-want-to-hear.html.

[41] Some scholars have expressed concern that the justices do not always select the cases most deserving of the Supreme Court's attention. *See generally* Samuel Estreicher and John Sexton, *Redefining the Supreme Court's Role* (New Haven: Yale University Press, 1986).

A vast literature examines the factors that inform the justices' cert decisions. While a complete survey of the literature is beyond the scope of this report, a review reveals that some of these factors are legal and jurisprudential, while others raise concerns about potentially inappropriate influences.

Supreme Court Rule 10 sets out a non-exhaustive list of factors that the Court may consider when deciding to grant cert:

"(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court."

Several studies suggest that the factors in Rule 10 make the Court more likely to grant cert. Actual or apparent conflict between lower courts or with the Supreme Court is associated with a higher likelihood of cert. Gregory Caldeira and John Wright, "Organized Interests and Agenda Setting in the U.S. Supreme Court," *American Political Science Review*, vol. 82, no. 4 (December 1988): 1118-1121; S. Sidney Ulmer, "The Supreme Court's Certiorari Decisions: Conflict as a Predictive Value," *American Political Science Review*, vol. 78, no. 4 (1984): 909; Ryan Black and Ryan Owens, "Agenda Setting in the Supreme Court: The Collision of Policy and Jurisprudence," *Journal of Politics*, vol. 71, no. 3 (July 2009): 1070.

The presence of the United States as a party also increases the likelihood of cert. Caldeira and Wright, 1118-1121; S. Ulmer, 908-911. Some scholars interpret the solicitor general's success with cert as an indication that the Court views the office's involvement as a sign that there is an "important federal question" at issue, in line with Rule 10. Margaret Cordray and Richard Cordray, "The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection," *Washington University Law*

Review, vol. 82, no. 2 (2004): 408, https://openscholarship.wustl.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1369&context=law_lawreview.

Studies have also found that the presence of amicus briefs increased the likelihood of cert. Caldeira Wright, 1122; Black and Owens, 1072. Caldeira and Wright suggest that this is because amicus briefs indicate a case's broader significance (1112), again in line with Rule 10, but there are other possible interpretations, including the specter of inappropriate influence from organized interests.

Jurisprudential factors like the justices' views of the proper role of the Court, such as how to enforce precedent or whether to drive social change, also influence their cert decisions. Cordray and Cordray, 423-452; Doris Provine, *Case Selection in the United States Supreme Court* (Chicago: University of Chicago Press, 1980), 6.

However, a number of studies suggest that the justices' personal policy preferences also influence their cert decisions. *See e.g.* Gregory Caldeira, John Wright and Christopher Zorn, "Sophisticated Voting and Gate-Keeping in the Supreme Court," *Journal of Law, Economics, and Organization*, vol. 15, no. 3 (October 1999), 549-572; Ryan Black and Ryan Owens, "Agenda Setting in the Supreme Court: The Collision of Policy and Jurisprudence," *Journal of Politics* vol. 71, no. 3 (July 2009), 1062-1075; H.W. Perry, *Deciding to Decide: Agenda Setting in the United States Supreme Court* (Cambridge: Harvard University Press, 1991)

The justices also appear to be sensitive to public opinion. *See* Amanda Bryan, "Public Opinion and Setting the Agenda on the U.S. Supreme Court," *American Politics Research* vol. 48, no. 3 (2020).

The identity of the attorney filing a cert petition also affects its success. Research suggests that members of the Supreme Court bar at elite law firms have significantly higher than average success rates, and also that when former Supreme Court clerks appear as attorneys on cert petitions or related amicus briefs a case is more likely to be granted cert. Richard Lazarus, "Advocacy Matters Before and Within the U.S. Supreme Court: Transforming the Court by Transforming the Bar," *Georgetown Law Journal*, vol. 90 (2008): 1515-1517, https://scholar.harvard.edu/rlazarus/files/rlazarus/files/lazarus_advocacy_matters_before.pdf; Huchen Liu and Jonathan Kastellec, "The Revolving Door in Judicial Politics: Former Clerks and Agenda Setting on the U.S. Supreme Court" (unpublished manuscript, May 26, 2021).

Information and advocacy completely outside the record of a case from online sources like social media may also shape perceptions of a case's cert-worthiness. Jeffrey Fisher and Allison Orr Larsen, "Virtual Briefing at the Supreme Court," *Cornell Law Review*, vol. 105 (2019): 103-4.

[42] One fundamental concern with the Court's discretion is that it challenges the classic conception, which Alexander Hamilton described in Federalist 78, that courts exercise "judgement," rather than "will."

Contemporary scholars have echoed this concern. *See e.g.* Peter Fish, "Judiciary Act of 1925," *The Oxford Companion to the Supreme Court of the United States*, 550; Edward Hartnett, "Questioning Certiorari: Some Reflections Seventy-Five Years after the Judges' Bill," *Columbia Law Review*, vol. 100, no. 7 (2000), 718; Paul Carrington, "Checks and Balances: Congress and the Federal Courts," in Roger

Cramton and Paul Carrington, eds., *Reforming the Court: Term Limits for Supreme Court Justices* (Durham: Carolina Academic Press, 2006), 154.

[43] *See* Paul Carrington and Roger Cramton, "Judicial Independence in Excess: Reviving the Judicial Duty of the Supreme Court," *Cornell Law Review*, vol. 94, no. 3 (2009), 633, https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1015&context=facpub.

[44] Paul Carrington and Roger Cramton, "Judicial Independence in Excess: Reviving the Judicial Duty of the Supreme Court," *Cornell Law Review*, vol. 94, no. 3 (2009), 632-634, https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1015&context=facpub.

[45] The Conference of Chief Justices is composed of the chief judicial officer in all 50 states, territories, and the District of Columbia.

For another proposal in favor of including state judges in the cert process, *see* Sanford Levinson, "Assessing the Supreme Court's Current Caseload: A Question of Law or Politics?," *Yale Law Journal Online*, vol. 119 (2010): 111, https://www.yalelawjournal.org/forum/assessing-the-supreme-courts-current-caseload-a-question-of-law-or-politics.

[46] Amanda Tyler, "Setting the Supreme Court's Agenda: Is There a Place for Certification?," *George Washington Law Review*, vol. 78, no. 6 (2009-2010): 1326, https://www.gwlr.org/wp-content/uploads/2012/08/78-6-Tyler.pdf. The certification procedure is defined at 28 U.S.C. § 1254(2) and states that when an appeals court certifies a question of law and requests instructions, "the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy." However, it is almost never used in modern times.

[47] *See* note 36.

[48] 28 U.S.C. §1253 states that "...any party may appeal to the Supreme Court ... in any civil action, suit, or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

Congress created three-judge courts in 1903 for certain antitrust cases. Act of Feb. 11, 1903, 32 Stat. 823. After the U.S. Supreme Court held in *Ex parte Young* that state officials could be sued to block them from implementing unconstitutional state laws, Congress also provided three-judge courts when litigants seek to enjoin state laws on U.S. constitutional grounds. *See* Act of June 18, 1910, ch. 309, §17; Pub. L. 75-352, 50 Stat. 751 (1937).

In 1976, Congress repealed most of the jurisdiction of three-judge courts and thereby also removed a significant source of the Supreme Court's mandatory docket. Pub. L. 94-381, 90 Stat. 1119 (1976); *See also* Mark Tushnet, "The Mandatory Jurisdiction of the Supreme Court—Some Recent Developments," *University of Cincinnati Law Review*, vol. 46, no. 2 (1977), 347; "The Three-Judge Court Act of 1910: Purpose, Procedure and Alternatives," *Journal of Criminal Law, Criminology, and Police Science*, vol. 62, no. 2 (1971); Margaret Cordray and Richard Cordray, "The Supreme Court's Plenary Docket," *Washington & Lee University Law Review*, vol. 58, no. 3 (2001), 737; "Note on Three-Judge District Courts, the Johnson Act of 1934, and the Tax Injunction Act of 1937," in *Hart and Wechsler's*

The Federal Courts and the Federal System, ed. Richard Fallon et al., 7th ed. (Foundation Press: 2015), 1089-1090.

[49] One study found that, during the period between 1983 and 2003, length of service among Supreme Court justices averaged about 24 years, compared to 14 years from 1789 to 1809. Judith Resnik, "Judicial Selection and Democracy: Demand, Supply, And Life Tenure," *Cardozo Law Review*, vol. 26, no. 2 (2005): 616, https://digitalcommons.law.yale.edu/fss_papers/759/.

Another study similarly found that justices who left office between 1971 and 2005 served an average of 26.1 years, compared with 7.5 for those leaving the bench between 1789 and 1820, and 14.9 years for those leaving any time before 1971. Steven G. Calabresi and James T. Lindgren, "Term Limits for the Supreme Court: Life Tenure Reconsidered," in *Reforming the Court: Term Limits for Supreme Court Justices*,23-24 (see note 29).

There is debate about the causes and significance of the shift. Some argue it can be explained by short tenures becoming rarer in modern times, rather than long tenures becoming longer. Alvin Chang, "Supreme Court terms have been getting longer. Here's why," *Vox*, February 17, 2016, https://www.vox.com/2016/2/17/11032182/pope-president-and-justice-ages.

Others question the utility of average tenure as a metric, and argue that the focus ought to be on median length of service, age of judge, and age at appointment, which show that recent decades are broadly in line with earlier periods. *See* Kevin McGuire, "Are the Justices Serving Too Long? An Assessment of Tenure on the U.S. Supreme Court," *Judicature*, vol. 89, no. 1 (July-August 2005): 10-12, https://mcguire.web.unc.edu/wp-content/uploads/sites/1749/2014/01/tenure.pdf; *See also* Ward Farnsworth, "The Regulation of Turnover on the Supreme Court," *University of Illinois Law Review*, vol. 2005, no. 2 (2005): 428, https://www.illinoislawreview.org/wp-content/ilr-content/articles/2005/2/Farnsworth.pdf.

A complete dataset on federal judicial tenures is available from the Federal Judicial Center. Federal Judicial Center, "Demography of Article III Judges, 1789-2020," https://www.fjc.gov/history/exhibits/graphs-and-maps/age-and-experience-judges.

[50] The text reads: "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." U.S. Const., Art. III.

[51] In practice, at the federal level, good behavior has meant life tenure, subject to removal through impeachment. However, there is some debate as to whether good behavior tenure inherently implies life tenure, or whether the two concepts are distinct. For an analysis of the common law history of the term, suggesting a good behavior tenure lasts a lifetime in the absence of misbehavior, *see* Raoul Berger, "Impeachment of Judges and 'Good Behavior' Tenure," *Yale Law Journal*, vol. 79, no. 8 (1970): 1477-1479, https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=6044&context=ylj.

For suggestions that good behavior tenure can imply a temporally bounded term, *see e.g.* Robert Kramer and Jerome Barron, "The Constitutionality of Removal and Mandatory Retirement Procedures for the Federal Judiciary: The Meaning of 'During Good Behavior,'" *George Washington Law Review*, vol. 35 (1966-1967): 455; Resnik, "Judicial Selection and Democracy: Demand, Supply, And Life Tenure,"

Cardozo Law Review, 614-619, (see note 49); David Dow and Sanat Mehta, "Does Eliminating Life Tenure for Article III Judges Require a Constitutional Amendment?," *Duke Journal of Constitutional Law and Public Policy*, vol. 16 (2021): 107-109, https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1172&context=djclpp.

[52] For instance, members of the German Constitutional Court serve 12-year terms with mandatory retirement at age 68. Law of the Federal Constitutional Court of Germany (as amended 2017), § 4. Mandatory retirement for members of the Australian and Canadian high courts is at ages 70 and 75, respectively. Austl. Const. ch. III, § 72; Supreme Court Act, R.S.C., ch. S-26, § 9(2) (1985) (Can.). *See also* Resnik, "Judicial Selection and Democracy: Demand, Supply, And Life Tenure," *Cardozo Law Review*, 614-5 (see note 49)..

[53] Mass. Const., Pt. 2, ch. III, art. I; Mass. Const. Art. XCVIII.

[54] A bill to create an 18-year term limit for Supreme Court justices was introduced in 2020. Supreme Court Term Limits and Regular Appointments Act of 2020, H.R. 8424, 116th Congress, § 4 (2020). A number of scholars have also advocated for 18-year term limits. James E. DiTullio and John B. Schochet, "Saving This Honorable Court: A Proposal to Replace Life Tenure on the Supreme Court with Staggered, Nonrenewable Eighteen-Year Terms," *Virginia Law Review*, vol. 90, no. 4 (2004): 1093, https://www.virginialawreview.org/wp-content/uploads/2020/12/1093.pdf; Steven G. Calabresi and James T. Lindgren, "Term Limits for the Supreme Court: Life Tenure Reconsidered," *Harvard Journal of Law and Public Policy*, vol. 29, no. 3 (2006): 769; Philip D. Oliver, "Systematic Justice: A Proposed Constitutional Amendment to Establish Fixed, Staggered Terms for Members of the United States Supreme Court," *Ohio State Law Journal*, vol. 47, no. 4 (1986): 800-801.

Some of these proposals have drawn support from a variety of sources. *See, e.g.* American Academy of Arts and Sciences Commission on the Practice of Democratic Citizenship, *Our Common Purpose: Reinventing American Democracy for the 21st Century* (2020), 6, https://www.amacad.org/sites/default/files/publication/downloads/2020-Democratic-Citizenship_Our-Common-Purpose_0.pdf; John Kruzel, "Dozens of legal experts throw weight behind Supreme Court term limit bill," *The Hill* (Oct. 23, 2020), https://thehill.com/regulation/court-battles/522447-dozens-of-legal-experts-throw-weight-behind-supreme-court-term-limit; Fix the Court, "What Senators Have Said About Supreme Court Term Limits," May 19, 2021, https://fixthecourt.com/2021/05/senatorsonscotustermlimits/.

Others have proposed term limits of lengths other than 18 years. *See* L.H. Larue, "Neither Force Nor Will," *Constitutional Commentary*, vol. 12 (1995), 180; Charles Collier, "The Supreme Court and the Principle of Rotation in Office," *George Washington University Law Review*, vol. 6 (1938): 424.

Other commentators have raised concerns with term limit proposals. Their questions include potential unconstitutionality and negative effects on the Court and confirmation process. *See, e.g.*, John Lawlor, "Court Packing Revisited: A Proposal for Rationalizing the Timing of Appointments to the Supreme Court," *University of Pennsylvania Law Review*, vol. 134 (1986): 991-993; Arthur Hellman, "Reining in the Supreme Court: Are Term Limits the Answer?," in *Reforming the Court: Term Limits for Supreme Court Justices*, 298-312 (see note 29); Stephen Burbank, "An Interdisciplinary Perspective on the Tenure of Supreme Court Justices," in *Reforming the Court: Term Limits for Supreme Court Justices*, 333-341 (see note 29); Ward Farnsworth, "The Case for Life Tenure," in *Reforming the Court: Term*

Limits for Supreme Court Justices, 251-265 (see note 29); David Garrow, "Protecting and Enhancing the U.S. Supreme Court," in *Reforming the Court: Term Limits for Supreme Court Justices*, 275-285 (see note 29).

[55] 28 U.S.C. § 294; *see* E. Jon Gryskiewicz, "The Semi-Retirement of Senior Supreme Court Justices," *Seton Hall Circuit Review*, vol. 11 (2015): 297 https://core.ac.uk/download/pdf/303929337.pdf.

[56] Steven G. Calabresi and James T. Lindgren, "Term Limits for the Supreme Court: Life Tenure Reconsidered," *Harvard Journal of Law and Public Policy*, vol. 29, no. 3 (2006): 769.

[57] *See, e.g.*, Richard Epstein, "Mandatory Retirement for Supreme Court Justices," in *Reforming the Court: Term Limits for Supreme Court Justices*, 419-427 (see note 29); David Garrow, "Mental Decrepitude on the U.S. Supreme Court: The Historical Case for a 28th Amendment," *University of Chicago Law Review*, vol. 67, no. 4 (2000): 1086-7, https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=5893&context=uclrev. As Garrow recounts, such proposals were considered several times during the 20th century.

[58] Resnik, "Judicial Selection and Democracy: Demand, Supply, And Life Tenure," 615 (see note 49).

[59] Judicial Conduct and Disability Act of 1980, 28 U.S.C. §§ 351-364. 28 U.S.C. § 372(a) allows judges who become permanently unable to perform their duties to retire with full pay if they have served for at least 10 years, and on half-pay if not. They may also take senior status, and be exempted from the workload requirements of that status upon their written certification of their disability. 28 U.S.C. § 371(e)(1)(E).

[60] *See, e.g.*, Ryan W. Scott and David R. Stras, "Retaining Life Tenure: The Case for a Golden Parachute," *Washington University Law Quarterly*, vol. 83, no. 5 (2006): 1439-1467, https://www.repository.law.indiana.edu/facpub/394; McGuire, "Are the Justices Serving Too Long? An Assessment of Tenure on the U.S. Supreme Court," 15, (see note 49); Judith Resnik, "So Long," *Legal Affairs*, July-August 2005, https://www.legalaffairs.org/issues/July-August-2005/argument_resnik_julaug05.msp.

A number of studies suggest pension eligibility can affect judges' retirement decisions, but several argue that as currently constructed, pensions have the least or no effect at the Supreme Court level. *See, e.g.*, Albert Yoon, "Pensions, Politics, and Judicial Tenure: An Empirical Study of Federal Judges, 1869-2002," *American Law and Economics Review*, vol. 8, no. 1 (2006): 143; Stephen Burbank, Jay Plager, and Gregory Ablavsky, "Leaving the Bench, 1970-2009: The Choices Federal Judges Make, What Influences Those Choices, and Their Consequences," *University of Pennsylvania Law Review*, vol 161, no. 1. (2012): 63, https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1005&context=penn_law_review; Peverill Squire, "Politics and Personal Factors in Retirement from the United States Supreme Court," *Political Behavior*, vol. 10, no. 2 (1988): 186; Jessica Perry and Christopher Zorn, "The Politics of Judicial Departures in the U.S. Federal Courts" (Apr. 15, 2008) (unpublished manuscript): 17. http://ssrn.com/abstract=1120773; Ross M. Stolzenberg and James Lindgren, "Retirement and Death in Office of U.S. Supreme Court Justices," *Demography*, vol. 47, no. 2 (2010): 281-2; Terri Peretti and Alan Rozzi, "Modern Departures from the U.S. Supreme Court: Party, Pensions, or Power?," *Quinnipiac Law Review*, vol. 30 (2011): 153-4.

[61] Burbank, Plager, and Ablavsky, "Leaving the Bench, 1970-2009: The Choices Federal Judges Make, What Influences Those Choices, and Their Consequences," 6-11, 53, (see note 60).

[62] The current pension system for justices and judges is outlined at 28 U.S.C. § 371(a) and (c). Congress has authorized retirement with a yearly salary equal to the salary at the time of leaving office, upon the age of 65 and once a justice or judge's age plus years of service add up to at least 80.

[63] Guide to Judiciary Policy, Code of Conduct for United States Judges, Introduction, https://www.uscourts.gov/sites/default/files/code_of_conduct_for_united_states_judges_effective_march_12_2019.pdf ("This Code applies to United States circuit judges, district judges, Court of International Trade judges, Court of Federal Claims judges, bankruptcy judges, and magistrate judges"); Chief Justice John Roberts, *2011 Year-End Report on the Federal Judiciary* (December 31, 2011), 4, https://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf. The Code of Conduct for United States Judges "includes ethical canons that apply to federal judges and provides guidance on their performance of official duties and engagement in a variety of activities." https://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges.

[64] The Committee on Codes of Conduct of the Judicial Conference of the United States also publishes advisory opinions "on ethical issues that are frequently raised or have broad application." *See* Guide to Judiciary Policy, Vol.2, Pt. B, Ch. 2, https://www.uscourts.gov/sites/default/files/guide-vol02b-ch02-2019_final.pdf.

[65] 28 U.S.C. § 455. Although the statute uses the term "justice," Chief Justice John Roberts has called into question whether the justices can be bound by § 455. John Roberts, *2011 Year-End Report on the Federal Judiciary* (December 31, 2011), 7, https://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf.

[66] *See, e.g.*, Cal. Code Civ. P. 170.3(c)(5) ("A judge who refuses to recuse himself or herself shall not pass upon his or her own disqualification or upon the sufficiency in law, fact, or otherwise, of the statement of disqualification filed by a party. In that case, the question of disqualification shall be heard and determined by another judge agreed upon by all the parties who have appeared or, in the event they are unable to agree within five days of notification of the judge's answer, by a judge selected by the chairperson of the Judicial Council, or if the chairperson is unable to act, the vice chairperson."); Utah R. Civ. P. 63(c)(1) ("The judge who is the subject of the motion must, without further hearing or a response from another party, enter an order granting the motion or certifying the motion and affidavit or declaration to a reviewing judge.").

At the federal level, Article III judges may "bow out of the case or ask that the recusal motion be assigned to a different judge for a hearing," but the law does not require it. *In re* United States, 158 F.3d 26, 34 (1st Cir. 1998).

[67] "A fair trial in a fair tribunal is a basic requirement of due process.... To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome." In re Murchison, 349 U.S. 133, 136 (1955). The Court has restated this principle on numerous occasions. Examples include Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 821-22 (1986); Marshall v. Jerrico, Inc.,

446 U.S. 238, 242 (1980); Withrow v. Larkin, 421 U.S. 35, 46-47 (1975); Ward v. Vill. of Monroeville, 409 U.S. 57, 61-62 (1972); Tumey v. Ohio, 273 U.S. 510, 523 (1927).

[68] Caprice Roberts, "The Fox Guarding the Henhouse?: Recusal and the Procedural Void in the Court of Last Resort," *Rutgers Law Review*, vol. 57 (2005): 169, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=869257.

[69] *See, e.g.*, Tex. R. App. P. § 16.3 ("[t]he challenged justice or judge must either remove himself or herself from all participation in the case or certify the matter to the entire court … [t]he challenged justices or judge must not sit with the remainder of the court to consider the motion as to him or her"); Alaska Stat. 22.20.020(c) ("If a judicial officer denies disqualification the question shall be heard and determined by … the other members of the supreme court"). *See also* Matthew Menendez and Dorothy Samuels, Brennan Center for Justice, *Judicial Recusal Reform: Toward Independent Consideration of Disqualification*, (2016), n. 47, https://www.brennancenter.org/our-work/research-reports/judicial-recusal-reform-toward-independent-consideration-disqualification; Russel Wheeler and Malia Reddick, *Judicial Recusal Procedures*, Institute for the Advancement of the American Legal System (June 2017), 5-8, https://iaals.du.edu/sites/default/files/documents/publications/judicial_recusal_procedures.pdf.

Several scholars have argued for similar practices at the federal level. *See* Amanda Frost, "Keeping Up Appearances," *Kansas Law Review*, vol. 53, no. 3 (2005): 535; Charles Gardner Geyh, "Why Judicial Disqualification Matters. Again." *Review of Litigation*, vol. 30 (2011): 720, https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1829&context=facpub.

[70] Supreme Court Justice William Rehnquist cited a "duty to sit" in *Laird v. Tatum*, a case challenging the constitutionality of President Nixon's Army surveillance program. Laird v. Tatum, 409 U.S. 824 (1972). Litigants had requested Justice Rehnquist disqualify himself from the case based on his role in the Office of Legal Counsel at the time that the administration began the surveillance program at issue. James Sample, "Supreme Court Recusal from Marbury to the Modern Day," *Georgetown Journal of Legal Ethics*, vol. 26 (2013): 116-117. Justice Rehnquist refused, stating that the consequence of disqualification of a justice of the Supreme Court is "that the principle of the law presented by the case is left unsettled…I believe it is a reason for not 'bending over backwards' in order to deem oneself disqualified." Laird, 409 U.S. at 838. Following Rehnquist's decision in *Laird*, in 1974, Congress enacted an amendment to the judicial qualification statute, 28 U.S.C. § 455, requiring judges' and justices' disqualification in cases where their "impartiality might reasonably be questioned." Sherrilyn A. Ifill, "Do Appearances Matter?: Judicial Impartiality and the Supreme Court in Bush v. Gore," *Maryland Law Review*, vol. 61, no. 3 (2002), 619, https://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=3174&context=mlr.

In 1993, Justices William Rehnquist, John Paul Stevens, Sandra Day O'Connor, Antonin Scalia, Anthony Kennedy, Clarence Thomas, and Ruth Bader Ginsburg issued a recusal policy statement that expressed an unwillingness to recuse in some circumstances due to the perceived impact of recusal on the Court: "We do not think it would serve the public interest to go beyond the requirements of the statute, and to recuse ourselves, out of an excess of caution, whenever a relative is a partner in the firm before us or acted as a lawyer at an earlier stage. Even one unnecessary recusal impairs the functioning of the Court." "Statement of Recusal Policy," November 1, 1993, 1.

The duty to sit could be rendered moot with a mechanism for replacing a recused justice. An example comes from Texas, where, in a 1925 case involving a fraternal order that all the judges then sitting were members of, the governor appointed three women lawyers to serve as an ad hoc Supreme Court. *See* Johnson v. Darr, 272 S.W. 1098 (Tex. 1925); *see also* Judith Resnik, "On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges," *Southern California Law Review*, vol. 61 (1987-1988): 1894-5, https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1930&context=fss_papers. Texas law now allows the state's Chief Justice to call a retired justice into temporary service when there is a vacancy left by recusal. Tex. R. of Judicial Admin.8; Tex. Gov. Code §74.003(b).

[71] There were four cases that resulted in a 4-4 split after Justice Scalia's death. Kedar S. Bhatia, *Stat Pack for October Term 2015*, SCOTUSblog (June 29, 2016), 1, http://www.scotusblog.com/wp-content/uploads/2016/06/SB_stat_pack_OT15.pdf.

[72] Of the 2017 Supreme Court term, when, after the death of Justice Scalia, the Court had eight justices, Justice Samuel Alito commented that "Having eight was unusual and awkward. That probably required having a lot more discussion of some things and more compromise and maybe narrower opinions in some cases that we would have issued otherwise…" Jess Bravin, "With Court at Full Strength, Alito Foresees Less Conservative Compromise With Liberal Bloc," *Wall Street Journal*, April 21, 2017, https://www.wsj.com/articles/BL-WB-68082. *See also* Adam Liptak, "A Cautious Supreme Court Sets a Modern Record for Consensus," *New York Times*, June 27, 2017, https://www.nytimes.com/2017/06/27/us/politics/supreme-court-term-consensus.html.

How to understand the impact of a recusal and when it could result in perpetual deadlock is unclear. The conciliatory behavior described by some during the year of eight justices might have been shaped by the knowledge of the new appointment that would come.

[73] *See* Ryan Black and Lee Epstein, "Recusals and the 'Problem' of an Equally Divided Supreme Court," *Journal of Appellate Practice and Process*, vol. 7, no. 1 (2005): 81, https://lawrepository.ualr.edu/cgi/viewcontent.cgi?article=1315&context=appellatepracticeprocess.

[74] "As between promoting fairness and administrative efficiency, the former goal is intuitively more compelling." Jed Handelsman Shugerman, "In Defense of Appearances: What *Caperton v. Massey* Should Have Said," *DePaul Law Review*, vol. 59, no. 2 (2010): 552, https://core.ac.uk/download/pdf/232966625.pdf. To guard against an increase in frivolous motions to recuse in the context of a more robust recusal regime, Federal Rule of Civil Procedure 11—applicable at the trial level—provides a model, including sanctions, against attorneys using motions to abuse the judicial process.

[75] The Judicial Conference attempted to address this issue in 2020 with its draft ethics opinion No. 117, which would have barred judges from being members of the American Constitution Society and Federalist Society ("reasonable and informed public would view judges holding membership in these organizations to hold, advocate, and serve liberal or conservative interests"). The proposal was abandoned after a group of judges objected to the ban on Federalist Society membership. *See* Letter to Robert Deyling, Assistant General Counsel, Administrative Office of the United States Courts, March 18, 2020, https://int.nyt.com/data/documenthelper/6928-judges-respond-to-draft-ethics/53eaddfaf39912a26ae7/optimized/full.pdf.

In a November 2020 speech to the Federalist Society, Justice Alito thanked "the many judges and lawyers who stood up to an attempt to hobble the debate that the Federalist Society fosters." Samuel Alito (speech, Federalist Society National Lawyers Convention, November 12, 2020), https://fedsoc.org/conferences/2020-national-lawyers-convention?#agenda-item-address-8.

Supreme Court journalist Adam Liptak said, "By not attending [the annual conventions of the American Constitution Society and Federalist Society], Kagan and the Chief are really showing the way. It is such a small thing, to simply stay at home…There is so much evidence of politicization in the Court and there is no need for the members to add to it." Interview with Adam Liptak, Columnist, *New York Times* (March 26, 2020) (on file with authors).

[76] The Ethics in Government Act requires all "judicial officers" to file financial disclosures within 30 days of receiving their position, and thereafter annually. 5 U.S.C. App. 4 §§ 101-111 (2006); 5 U.S.C. App. 4 § 109(10) (2006) (defining judicial officer as "the Chief Justice of the United States, the Associate Justices of the Supreme Court, and the judges of the United States courts of appeals, United States district courts, … and any court created by Act of Congress, the judges of which are entitled to hold office during good behavior").

[77] Canon 4(D)(3) of the Code of Conduct for United States Judges directs judges to "divest investments and other financial interests that might require frequent disqualification." However, given the difficulty in predicting what entities may be parties to cases, this requirement may be insufficient.

[78] Walter Shaub, "Conflicts of Interest," in Brookings Institution, *If It's Broke, Fix It* (2021), 12, https://www.brookings.edu/wp-content/uploads/2021/02/Brookings-Report-If-its-Broke-Fix-it.pdf.

Federal law currently calls on the Judicial Conference to review judges' financial disclosure. 5 U.S.C. app. § 106(a)(2). However, some scholars and advocates have called for more robust oversight mechanisms within the judicial branch. *See* Diane M. Hartmus, "Inspection and Oversight in the Federal Courts: Creating an Office of Inspector General," *California Western Law Review*, vol. 35, no. 2 (1999): 243; Jacquelin Thomson, "House Democrats Urge Federal Judiciary to Add Inspector General," *National Law Journal*, September 6, 2019. https://www.law.com/nationallawjournal/2019/09/06/house-democrats-urge-federal-judiciary-to-add-inspector-general/.

To avoid undue burdens on judges who may not have the means to employ numerous professionals to ensure compliance with rigorous disclosure requirements, justices and judges could also be provided with assistance in evaluating how to comply with disclosure requirements.

[79] Jeremy Bentham, "Draught of a New Plan for the Organisation of the Judicial Establishment in France; With Critical Observations on the Draught Proposed by the National Assembly Committee, in the Form of a Perpetual Commentary, in *The Works of Jeremy Bentham*, ed. John Bowring, vol. 4 (New York: Russell & Russel, 1962), 316. ,"

[80] The Supreme Court has repeatedly affirmed the public's right to access criminal trials and pre-trial proceedings. *See* Richmond Newspapers Inc. v. Virginia, 448 U.S. 555 (1980); Globe Newspaper Co. v. Superior Court, County of Norfolk, 457 U.S. 596 (1982); Press-Enterprise Co. v. Superior Court of California, 464 U.S. 501 (1984); Press-Enterprise Co. v. Superior Court of California, 478 U.S. 1 (1986).

While the Supreme Court has not issued similar rulings on civil proceedings, there is good reason to believe they should be treated similarly to criminal proceedings. *See* James Nowaczewski, "The First Amendment Right of Access to Civil Trials After *Globe Newspaper Co. v. Superior Court*," *University of Chicago Law Review*, vol. 51, no. 1 (1984): 286.

[81] Congress has considered but not yet enacted laws to increase the amount of information the courts share with the public. *See e.g.*, Sunshine in the Courtroom Act of 2021, S. 818, 117th Cong. (2021), which would permit public broadcast of the proceedings of appellate courts, including the United States Supreme Court; Sunshine in Litigation Act of 2017, H.R. 1053, 115th Cong. (2017), which would have required the release of certain kinds of court information unless a judge found confidentiality outweighed the public interest.

[82] *See generally* William Baude, "Foreword: The Supreme Court's Shadow Docket," *New York University Journal of Law and Liberty*, vol. 9 (2015), https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1961&context=public_law_and_legal_theory; Stephen Vladeck, "The Solicitor General and the Shadow Docket," *Harvard Law Review*, vol. 133 (2019), https://harvardlawreview.org/2019/11/the-solicitor-general-and-the-shadow-docket/; *The Supreme Court's Shadow Docket: Hearing Before the House Judiciary Subcommittee on Courts, Intellectual Property, and the Internet*, 117th Cong., February 18, 2021. https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=4371.

[83] For example, in two January 2021 capital cases, the Court vacated a stay of execution ordered by circuit court without explanation. U.S. v. Higgs, 592 U.S. ___ (2021); Rosen, Acting Att'y Gen., et al. v. Lisa Montgomery, No. 20A122 (2021) (order granting vacatur), https://www.supremecourt.gov/orders/courtorders/011221zr1_f2ag.pdf. In *Higgs*, the Court reversed a stay before the circuit court had ruled on the merits of the case, granting "cert before judgment."

[84] It was the Court's practice in the late 1800s to give brief explanations for a justice's non-participation in a case. The practice ended in 1904. Gabe Roth, "Explaining the Unexplained Recusals at the Supreme Court," Fix the Court, May 3, 2018, https://fixthecourt.com/wp-content/uploads/2018/05/Recusal-report-2018-updated.pdf.

The explanation could be made in a manner that does not disclose potentially damaging information about a party before the court.

[85] The Rules Enabling Act empowers the Supreme Court and lower federal courts to prescribe rules "for the conduct of their business." 28 U.S.C. § 2071-2077. For any rule prescribed by a lower court, the law requires a notice and comment period, permitting the public an opportunity to participate in the process. However, rules promulgated by the Supreme Court for itself or for lower courts are exempt from this requirement. 28 U.S.C. § 2071(b). The Act also requires the Judicial Conference of the United States to prescribe a process for adoption of such rules, as well as appoint a standing committee to review proposed rule changes. 28 U.S.C. § 2073; Judicial Conference of the United States, Procedures for Committees on Rules of Practice and Procedure, § 440.

[86] Congress has considered requiring the justices to disclose recusal explanations. Supreme Court Transparency and Disclosure Act of 2011, H.R. 862, 112th Cong. (2011).

A number of scholars have advocated for more transparent recusal decision-making. *See* Frost, "Keeping Up Appearances," 535 (see note 69); Suzanne Levy, "Your Honor, Please Explain: Why Congress Can, and Should, Require Justices to Publish Reasons for Their Recusal Decisions," *University of Pennsylvania Journal of Constitutional Law*, vol. 16, no. 4 (2013-2014): 1170-1179, https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1533&context=jcl; James Sample, "Supreme Court Recusal: From Marbury to the Modern Day," *Georgetown Journal of Legal Ethics*, vol. 26, no. 1 (2013): 150-151, https://scholarlycommons.law.hofstra.edu/cgi/viewcontent.cgi?article=1949&context=faculty_scholarship; New York City Bar Association Committee on Government Ethics, *Supreme Court Ethics: The Need for Greater Transparency in a Justice's Decision to Hear a Case* (September 2012), https://www2.nycbar.org/pdf/report/uploads/20072211-SupremeCourtEthics--TheNeedforGreaterTransparencyinaRecusal.pdf.

[87] Adam Liptak, "The Supreme Court Will Hear Arguments by Phone. The Public Can Listen In," *New York Times*, April 13, 2020, https://www.nytimes.com/2020/04/13/us/politics/supreme-court-phone-arguments-virus.html. Since April 2020, the Court has decided on a monthly basis whether telephonic oral arguments will be continued and whether livestreaming will be permitted. *See* U.S. Supreme Court, "COVID-19 Announcements," https://www.supremecourt.gov/announcements/COVID-19.aspx.

[88] Tens of thousands of people listened to the first live streamed cases in May 2020. Melissa Wasser, Reporters Committee for Freedom of the Press, "Summary of Supreme Court Oral Argument Numbers (May 2020)," (on file with authors). A majority of the public believes that Supreme Court arguments should be televised. C-SPAN/PSB, "Supreme Court Survey: Agenda of Key Findings," August 28, 2018, https://static.c-span.org/assets/documents/scotusSurvey/CSPAN%20PSB%202018%20Supreme%20Court%20Survey%20Agenda%20of%20Key%20Findings%20FINAL%2008%2028%2018.pdf.

The Supreme Court could act on its own to permit camera access, and Congress has also considered obliging the Court to do so. In June 2021, the Senate Judiciary Committee favorably reported a bill that would require the Court to allow television coverage of open sessions. *See* Cameras in the Court Act, S.807, 117th Cong. (2021), https://www.congress.gov/bill/117th-congress/senate-bill/807/text. For a discussion of similar past legislative efforts, *see* Congressional Research Service, *Video Broadcasting from the Federal Courts: Issues for Congress*, R44514 (October 28, 2019), https://fas.org/sgp/crs/misc/R44514.pdf; Lorraine Tong, Congressional Research Service, *Televising Supreme Court and Other Federal Court Proceedings: Legislation and Issues*, RL33706 (November 8, 2006), https://fas.org/sgp/crs/secrecy/RL33706.pdf.

[89] Government Accountability Office, *U.S. Supreme Court: Policies and Perspectives on Video and Audio Coverage of Appellate Court Proceedings*, GAO-16-437 (April 2016), https://www.gao.gov/assets/gao-16-437.pdf; Reporters Committee for Freedom of the Press, "Open Courts Compendium," https://www.rcfp.org/open-courts-compendium/.

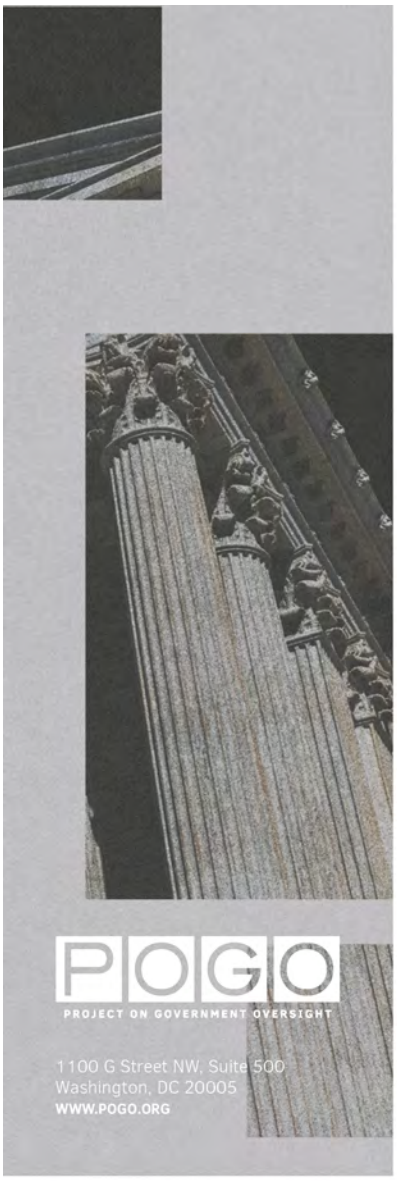
For discussion of camera access policies in several other countries' highest courts, *see generally* Kyu Ho Youm, "Cameras in the Courtroom in the Twenty-First Century: The U.S. Supreme Court Learning from Abroad?," *Brigham Young University Law Review,* vol. 2012, no. 6 (2012),

https://digitalcommons.law.byu.edu/cgi/viewcontent.cgi?article=2699&context=lawreview.

[90] *See generally* Tony Mauro, "Let the Cameras Roll: Cameras in the Court and the Myth of Supreme Court Exceptionalism," *Reynolds Courts & Media Law Journal*, vol. 1 (2011); Jordan M. Singer, "Judges on Demand: The Cognitive Case for Cameras in the Courtroom," *Columbia Law Review Sidebar*, vol. 115 (2015), https://columbialawreview.org/content/judges-on-demand-the-cognitive-case-for-cameras-in-the-courtroom/; Lisa McElroy, "Cameras at the Supreme Court: A Rhetorical Analysis," *Brigham Young University Law Review*, vol. 2012, no. 6 (2012), https://digitalcommons.law.byu.edu/lawreview/vol2012/iss6/6/.

One line of research suggests that courts gain legitimacy when the public is exposed to the unique symbols and practices that set them apart from partisan institutions, which could imply that greater access will increase legitimacy. But scholars also suggest legitimacy could suffer if the court appeared partisan. *See generally* James Gibson and Gregory A. Caldeira, "Knowing the Supreme Court? A Reconsideration of Public Ignorance of the High Court," *Journal of Politics*, vol. 71, no. 2 (2009). *See also* Vanessa A. Baird and Amy Gangl, "Shattering the Myth of Legality: The Impact of the Media's Framing of Supreme Court Procedures on Perceptions of Fairness," *Political Psychology*, vol. 27, no. 4 (2006): 606-607;

Christopher Kromphardt, "Shine a Light: Televised Oral Arguments and Judicial Legitimacy," American Political Science Association Annual Meeting Paper, 2013, 8-9, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2300517.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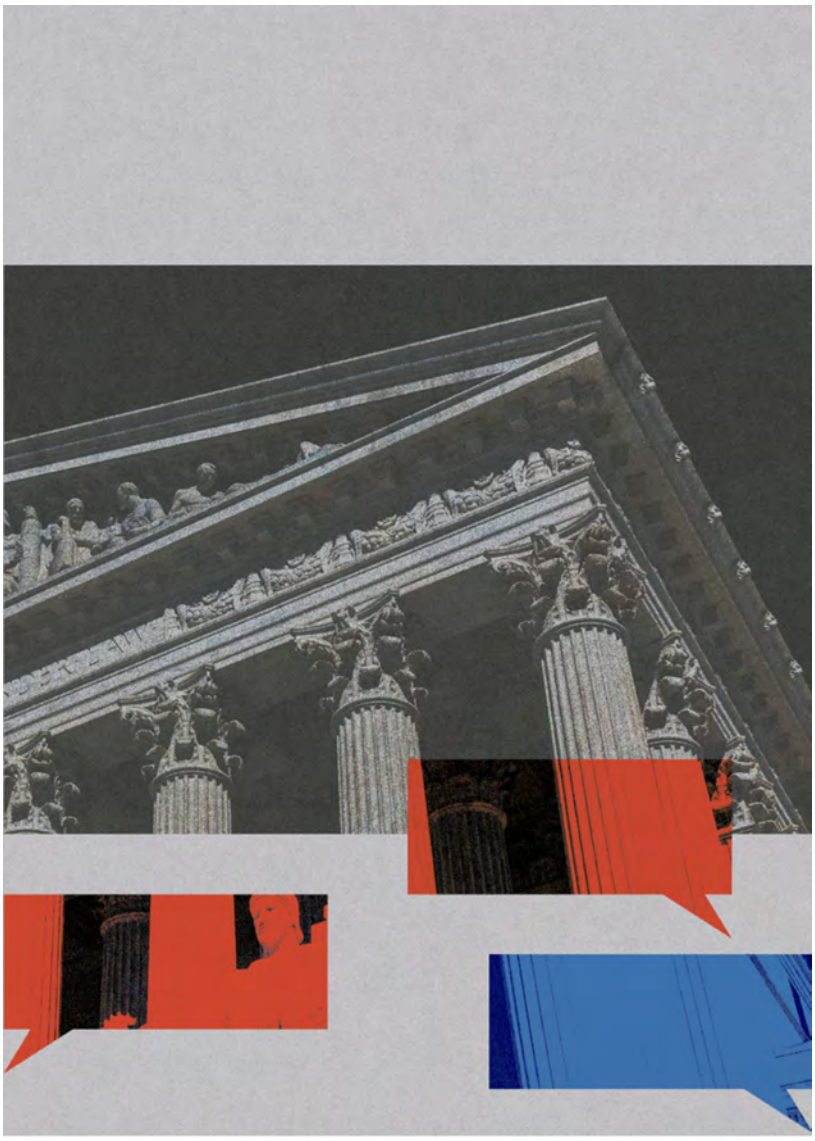

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